Supreme Court, U.S.
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In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

REDACTED

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QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4)(A), preempts states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children.

2. Whether the FAAAA preempts states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to utilize a carrier that provides age verification and signature services to ensure that such substances are not delivered to children.

PARTIES TO THE PROCEEDING

Petitioner G. Steven Rowe is the Attorney General of the State of Maine, acting in his official capacity. Respondents New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., and Vermont Truck and Bus Association, Inc., (the "Associations"), are trade associations of businesses engaged in the commercial delivery of packages containing property.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit in this case decided on May 19, 2006.

OPINIONS BELOW

The opinion of the court of appeals is reported at 448 F.3d 66 (Petition Appendix ("App.") 1). The district court's opinions are reported at 377 F. Supp. 2d 197, 324 F. Supp. 2d 231, and 301 F. Supp. 2d 38 (App. 31, 73, and 86).

JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331, and entered a final amended judgment on June 29, 2005. The court of appeals asserted jurisdiction pursuant to 28 U.S.C. § 1291, and entered judgment on May 19, 2006. The district court entered its second amended judgment on June 29, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue in this case is whether Maine's "Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors" ("Maine Act"), which regulates retailers and deliverers of tobacco products in order to protect children, is preempted by the Federal Aviation Administration Authorization Act

of 1994 ("FAAAA"), Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605. Article VI, clause 2 of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

The first FAAAA preemption provision states:

> (A) General rule. – Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

49 U.S.C. § 41713(b)(4)(A). Subparagraph (B), captioned "Matters not covered," provides that subparagraph (A)

> (i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and
>
> (ii) does not apply to the transportation of household goods. . . .

49 U.S.C. § 41713(b)(4)(B).

The second preemption provision states:

> (c) Motor carriers of property. (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). Paragraph (2), captioned "Matters not covered," exempts from preemption the same areas set forth above for air carriers, and also certain types of towing rates. 49 U.S.C. § 14501(c)(2). Paragraph (3), captioned "State standard transportation practices," exempts from preemption state regulation related to certain uniform liability rules, bills of lading, and credit rules and certain antitrust laws if such regulation "is no more burdensome than compliance with" federal law, and the carrier requests that the law apply to it. 49 U.S.C. § 14501(c)(3).

The pertinent provisions of the Maine Law, in particular 22 Me. Rev. Stat. Ann. §§ 1555-C(3)(C) and 1555-D, are reproduced at App. 100, and immediately discussed below.

STATEMENT

This case presents the issue of whether Congress has preempted the states from controlling the delivery of dangerous substances, here tobacco, where a carrier such as United Parcel Service ("UPS") is used as the conduit for illegal transactions.

1. The Maine Tobacco Delivery Law. The Maine law at issue here is strongly rooted in the State's traditional police powers to protect the health of its children. Maine, like other states, has historically regulated the transport and delivery of various substances in order to protect the public. These laws range from limiting the sale and delivery of fireworks and explosives, to prohibiting the delivery of liquor, drugs and handguns to minors, to regulating the transportation of plants and wild animals.[1]

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[1] *See, e.g.*, 28-A Me. Rev. Stat. Ann. §§ 2073, 2077, originally enacted in 1987, Me. Pub. L. 1987, c. 45, § A, 4 (liquor transportation provisions); former 12 Me. Rev. Stat. Ann. § 7534, originally enacted in 1979, Me. Pub. L. 1979, c. 420, § 1 ("Any common carrier accepting any wild animal or wild bird for transportation shall" check the hunter's license, affix tags and identification, and make returns to the commissioner); 8 Me. Rev. Stat. Ann. §§ 221, *et seq.*, enacted by Me. Pub. L. 1985, c. 23, § 2 (prohibiting possession, sale or transport "in any conveyance" of fireworks "except as permitted by" state regulations); 17-A Me. Rev. Stat. Ann. § 1001(1)(B), enacted by Me. Pub. L. 1975, c. 499, § 1 (prohibiting transport or sale of explosives without a permit); 28-A Me. Rev. Stat. Ann. § 2081, enacted by Me. Pub. L. 1987, c. 45, § A, 4 (prohibiting furnishing, delivering, or giving liquor to a minor); 7 Me. Rev. Stat. Ann. § 3981, enacted by Me. Pub. L. 1987, c. 383, § 3 (regulating periods of confinement and conditions for transportation of animals); 12 Me. Rev. Stat. Ann. §§ 8305-06, originally enacted by Me. Pub. L. 1979, c. 545, § 3 (prohibiting and regulating shipment of plants and trees); 17-A Me. Rev. Stat. Ann. § 1118 (transporting scheduled drugs); 17-A Me. Rev. Stat. Ann. § 554-B(2) (transferring handgun to minor).

It is illegal in Maine for a minor to "purchase, possess or use cigarettes, cigarette paper or any other tobacco product." 22 Me. Rev. Stat. Ann. § 1555-B(5-A). A person "may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age" and may not sell "to any person under 27 years of age unless the seller first verifies that person's age by means of reliable photographic identification containing the person's date of birth." *Id.* at § 1555-B(1) & (2).

Internet and telephone sales of tobacco products have become a serious problem. By means of delivery services, enterprising retailers seek to avoid over-the-counter age verification requirements by selling the tobacco products to minors and delivering them not over-the-counter, but rather through third-party carriers such as UPS. In response to this dangerous practice, in 2003 the Maine Legislature passed "An Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors," Me. Pub. L. 2003, c. 444.

The Act requires a person who engages in the sale of tobacco products by means of delivery to take a number of steps to ensure that tobacco products do not reach the hands of minors. Retailers engaged in delivery sales of tobacco to Maine citizens must obtain a retail license from the Maine Department of Human Services (22 Me. Rev. Stat. Ann. § 1555-C(1)), just as over-the-counter retailers must (*Id.* at § 1551-A). Similarly, the Act requires the internet or telephone tobacco retailer to obtain age verification (*Id.* at § 1555-C(2)), just as age verification for persons under 27 years of age is called for in over-the-counter sales (*Id.* at § 1555-B(2)).

The Act requires the retailer to "clearly mark the outside of the package . . . to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the . . . retailer." *Id.* at § 1555-C(3)(B).[2] Section 1555-C(3)(C) applies only to retailers who ship tobacco products, not to the carriers, and calls for tobacco retailers to "utilize a delivery service that imposes" requirements that the addressee be of legal age to purchase tobacco products and sign for the package, the purchaser be the addressee, and, if the addressee is under 27 years old, present a valid identification showing proof of age.[3] Tobacco products shipped in violation of these requirements are contraband, subject to forfeiture. *Id.* at 1555-C(7).

Section 1555-D of the Act applies to carriers and, in pertinent part, provides:

> A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer. A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of section 1555-C, subsection 3, paragraph B or if the person

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[2] Maine adopted rules for the enforcement of this law that require, *inter alia*, the retailer to mark the label side of the package with a tobacco marking, and does not require a carrier to look at the bottom of a package for tobacco markings. 10-144 -203 Me. Code. R. §§ 10(C)(2), 11.

[3] Section 1555-C(3)(A) requires the tobacco retailer, prior to shipping, to provide to the delivery service the age of the purchaser.

> receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section.

Transgressions are civil violations punishable by fines of from $50 to $1500, and the Attorney General may enforce the law by seeking injunctive relief. *Id.* at § 1555-D(2) & (3). Maine maintains a list of licensed and known unlicensed retailers, provides the list to delivery services, and reliance on that list is an affirmative defense. *Id.* at § 1555-D(3) & (4). These provisions ensure that a carrier is not delivering contraband tobacco.

2. The Federal Aviation Administration Authorization Act of 1994. The FAAAA was intended to preempt the states from engaging in economic regulation in order (1) to eliminate non-uniform "[s]tate economic regulation of motor carrier operations [that] causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtails the expansion of markets"; and (2) to "level the playing field" between air carriers and motor carriers. H.R. Conf. Rep. No. 103-677, at 85-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60. "The problem to which the congressional conferees attended was 'state *economic* regulation.'" *City of Columbus v. Ours Garage and Wrecking Service, Inc.*, 536 U.S. 424, 440 (2002) (emphasis in original). There is no hint that Congress intended to preempt state public health laws regulating the delivery of dangerous substances.

The pertinent preemption provisions were enacted as Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605. Congress found that state regulation of intrastate transportation of property imposed unreasonable burdens on and impeded the free flow of interstate commerce and placed an unreasonable

cost on American consumers, and, therefore, "*certain aspects* of the State regulatory process should be pre-empted." Pub. L. No. 103-305, § 601(a)(1) & (2) (emphasis added).

Section 41713(b) of Title 49 was amended to add a "[g]eneral rule" that "[e]xcept as provided in subparagraph (B)," a state could not enact or enforce a law "related to a price, route, or service of an air carrier . . . when such carrier is transporting property by aircraft or by motor vehicle." Pub. L. No. 103-305, § 601(b)(1), codified at 49 U.S.C. § 41713(b)(4)(A). Subparagraph (B), entitled "Matters not covered," provided that preemption would not cover state regulation of safety, hazardous cargo, insurance or household goods. Pub. L. No. 103-305, § 601(b)(1), codified at 49 U.S.C. § 41713(b)(4)(B).

In order to accomplish the goal of placing air and ground carriers on the same economic plane, as part of the FAAAA Congress enacted a new subsection entitled "Preemption of State *Economic* Regulation of Motor Carriers." Pub. L. No. 103-305, § 601(c) (emphasis added). This new subsection proscribed states from enacting or enforcing laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Pub. L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(1), now codified at 49 U.S.C. § 14501(c)(1). The exemptions from preemption for motor carriers included the same matters exempted for air carriers – state regulation of safety, hazardous cargo, insurance or household goods. Pub.

L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(2), now codified at 49 U.S.C. § 14501(c)(2).[4]

The exceptions came about due to Congress' paying specific attention to the American Trucking Association's position that there be no preemption of state "non-economic factors," and the conferees intended to implement that approach. H.R. Conf. Rep. No. 103-677, at 88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760; *City of Columbus,* 536 U.S. at 440-41. In particular, the conferees added the specific exceptions to preemption in an effort to make clear that the intent was "to preempt *economic* regulation by the States"; and the conferees explained that those specific exceptions "were not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756, 1758-60 (emphasis added). Non-uniform regulation in non-preempted areas was expected and permitted. *City of Columbus,* 536 U.S. at 441.

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[4] Congress also included an additional exemption from preemption for motor carriers for certain "State standard transportation practices" regarding uniform liability, bills of lading, credit rules and antitrust laws if the carrier requests that the state law apply to it. Pub. L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(3), now codified at 49 U.S.C. § 14501(c)(3).

Just one year after its enactment, § 11501(h) was recodified at 49 U.S.C. § 14501(c), with an added exemption for state regulation of nonconsensual tow rates – by the Interstate Commerce Commission Termination Act of 1995 (ICC Termination Act), Pub. L. No. 104-88, § 103, 109 Stat. 803, 899. The tow rate exemption is now found at section 14501(c)(2)(C).

3. Operative Facts. The three respondents-plaintiffs are non-profit trade associations whose members are "engaged in the commercial delivery of packages containing property." In their challenge to the Maine Act, the Associations relied entirely upon the experience and facts of UPS.

Ordinarily, and prior to the enactment of this law, all sides of the exterior of packages are visually scanned at many stages through the distribution process[5] for, *inter alia,* labels, signs of damage, improper packaging, leakage, handguns, prohibited contents and hazardous waste markings by various UPS employees such as sorters, presorters and drivers. UPS has implemented written procedures and policies relating to the delivery of substances such as alcohol and handguns.

In response to the Maine Act, UPS instructed certain of its employees in Maine to look for markings indicating

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[5] UPS uses a "hub-and-spoke" system, which consists of an extensive network of sorting facilities throughout the country that generally works as follows: the person or entity shipping the package provides delivery information on UPS's shipping form or though an electronic shipping system; the package enters UPS's system through a package driver pick-up (including pickups from the shipper, an outlet such as a UPS Store or a UPS drop box), or through UPS's customer counter; the driver brings the picked-up package to a local operating center; the package is unloaded and placed on conveyor belts for sorters to separate based on delivery location and the delivery time commitment; feeder vehicles and, in some cases, airplanes and trains take the package from the centralized hub to another hub for further sorting, and ultimately to a local center for delivery; at the local center the package is further sorted and loaded onto a vehicle for delivery based on the recipient's address; and at delivery the driver physically delivers the package checking specific delivery information, such as the need for age verification or a signature, on a hand-held computer device (a "DIAD").

that a package contained tobacco products. The preloaders and drivers were instructed to treat any such package as non-deliverable, and to give that package to a designated employee who assesses how to proceed, including returning the package to the sender or disposing of the package.

A UPS employee estimated that it takes a preloader approximately an additional two seconds to visually scan the label of a package for tobacco indicia. Based upon this estimate, the UPS employee provided a cost figure for Maine, amounting to approximately $0.009, or less than one cent, per package. UPS did no other study or analysis to determine whether a driver spends any additional time to comply with the Maine Act, or what the effect of the Maine Act is on its package sorting rate. UPS delivers approximately 65,000 packages per day in Maine.

During a five-month period, UPS intercepted a total of thirty-three packages that its workers believed contained tobacco products destined for Maine consumers. UPS estimates that it costs approximately $2.00 in personnel time to deal with each such package. Thus, according to UPS, for a five month period there was an additional $66 in costs to UPS to comply with Maine's law. UPS's total revenue in 2003 was $33.5 billion.

UPS's computer systems, according to UPS, can do "pretty much anything." It is the second largest computer system in the world. At the time of each and every delivery, the UPS driver checks and enters delivery information on a hand-held computer device ("DIAD"). The DIAD has the capability and does provide relevant prompts or "alerts" regarding each package when delivered. These "alerts" inform the driver, *inter alia,* whether a signature or adult confirmation is required. UPS has the capability

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to flag specific delivery addresses or specific consignees to generate an alert, [redacted] UPS offers a delivery confirmation, adult signature-required service, for an additional fee of either $1.75 or $2.75. When a driver delivers such a package, she receives a prompt on her DIAD to have her verify the age of the person receiving the package or obtain a signature. [redacted]

The State provided to UPS an electronic version of its list of known unlicensed tobacco retailers who may be attempting to unlawfully ship tobacco to Maine consumers, but UPS has not researched whether any of its regular shippers are on the state list of known unlicensed tobacco retailers. UPS has over 4,000 employees in the technology and information systems area but did no study of the capability of the system regarding compliance with the Maine law.

During the pendency of the appeal, UPS entered into an agreement to comply with New York's "Unlawful Shipment of Cigarettes Law," N.Y. Pub. Health Law, § 1399-*ll*. UPS agreed, *inter alia*, to impose measures to ensure that employees "actively" look for indications that a package contains cigarettes, and to instruct preloaders and drivers not to load for delivery or deliver cigarette packages to consumers. UPS's policy is to "require its shippers to be licensed by applicable law in order to ship tobacco products," and to accept shipments of cigarettes for delivery only to recipients who are licensed by applicable federal or state law to receive cigarette deliveries.

4. Proceedings Below. On October 10, 2003, the Associations commenced this action in the United States

District Court for the District of Maine to challenge sections 1555-C(3)(A) and (C) and 1555-D of the Maine Act as preempted facially and as-applied by the FAAAA. The Associations immediately filed a motion for summary judgment that those provisions were facially preempted. On February 6, 2004, the district court denied plaintiffs' motion, holding the challenged portions of the Maine Act were not facially preempted by the FAAAA. (App. 86). The court allowed the Associations to proceed on the as-applied challenge.

The Attorney General then filed a motion for summary judgment on the facial challenge for the reasons set forth in the court's first decision. On June 30, 2004, the district court granted summary judgment for the Attorney General on "all counts as to any facial FAAAA preemption challenges to" the Maine Act. (App. 73).

Cross-motions for summary judgment were filed, and, on May 27, 2005, the district court issued its ruling in favor of the Associations and against the Attorney General that sections 1555-C(3)(C) and 1555-D were preempted by the FAAAA both facially, thus reversing its prior rulings, and as applied. (App. 31).

The Attorney General appealed. On May 19, 2006, the First Circuit issued its decision effectively affirming the lower court's decision.[6] (App. 1). The First Circuit held that

[6] Below, the Attorney General sought dismissal of the action on the grounds of mootness and lack of associational standing. The appeals court rejected those positions (App. 7-12). In particular, the First Circuit reasoned the matter was not moot because the New York agreement dealt only with cigarettes, while Maine's law covers all tobacco products. The Attorney General no longer presses these arguments.

the FAAAA "preempts state police-power enactments" to the extent they have "the effect of forcing [a carrier] to change its uniform package-processing procedures," and the purpose of the state law is irrelevant to the preemption inquiry. (App. 17-18, 28). The court reasoned that the "related to" language of the FAAAA's preemption provisions as well as the FAAAA's structure and legislative history support a broad preemptive effect, and that the Attorney General's view would "swallow the rule of preemption" because most state laws are enacted pursuant to the states' police powers. (App. 14-21). The appeals court also found that the conferees' specific reference to *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), required adherence to a broad view of preemption, and the court refused to apply subsequent Supreme Court interpretation of similar "relate to" preemption language in ERISA, indicating it was for the Supreme Court and not the First Circuit to do so. (App. 14-16, 20).

The appeals court found that section 1555-C(3)(C) – which requires tobacco retailers to use a delivery service that provides delivery directly to the purchaser, a signature, and age verification – is "related to" a carrier's service due to the potential for delay if a carrier chose to provide such options. (App. 23). Although the provision applies only to retailers, the court reasoned it indirectly regulated carriers by "employing [the state's] coercive powers to police the method by which carriers provide services in the state." (App. 24).

Section 1555-D precludes carriers from *knowingly* delivering tobacco products to children. The First Circuit found that so much of section 1555-D that proscribed "knowing" delivery of tobacco for an unlicensed retailer was not preempted. (App. 26). However, the appeals court

went on to conclude that section 1555-D was preempted to the extent it charged carriers with knowledge that a package contains tobacco products if the package is so marked or if the shipper appears on the Attorney General's list of licensed or known unlicensed retailers. (*Id.* at 27-28). These provisions were found to be preempted because they require the carrier "to change its uniform package-processing procedures" by inspecting every package destined for delivery in Maine and segregating the packages that contain tobacco to research whether the addressee is a Maine-licensed retailer or distributor who can receive the package. (*Id.*) The First Circuit conceded there was "potential tension" in its decision – Maine hypothetically could prosecute a carrier for "knowing delivery" of contraband tobacco, but Maine could not impute knowledge "based on a failure to read labels or consult lists – an imputation which would amount to prescribing how carriers must operate." (*Id.* at 28-29). Of course, these are the identified means to prove "knowing" delivery of tobacco. The court admitted that "as a practical matter, [it] may be difficult to prove" a case against a carrier. (*Id.* at 29).

REASONS FOR GRANTING WRIT

The First Circuit's decision has far-reaching and devastating effects on the states' ability to exercise their historic health-related police powers. The First Circuit held that the FAAAA preempts the exercise of the state's historic public health police powers whenever the state regulation directly or indirectly potentially affects a carrier's business. The decision forbids states from requiring retailers to use a carrier that provides age verification

and signature services, even though some carriers already provide these types of services. And the decision forbids states from imputing knowledge to a carrier from obvious tobacco markings on a package because it has "effects" on the "uniformity" of a carrier's procedures, even though the carriers already check the packages for a variety of other markings and for damage. These are the means to regulate delivery of dangerous substances, and the First Circuit has identified no others. The decision, thus, preempts countless state laws that have existed for decades, regulating the sale and delivery of substances, from tobacco to weapons to alcohol. *See* note 1, *supra.*

It is beyond debate that unregulated access by children to tobacco products is a serious public health problem – tobacco addicts, sickens and kills. Regulation of children's access to tobacco traditionally and specifically is intended by Congress to be handled by the states. There is *no* federal program regulating delivery sales of tobacco by telephone and internet retailers. The appeals court decision effectively leaves delivery sales of tobacco to children unregulated by any government, a result nowhere suggested by Congress or supported by common sense.

The First Circuit's decision is wrong and conflicts with decisions of this Court. The FAAAA was intended to preempt state *economic* regulation, *City of Columbus,* 536 U.S. at 432. There is no hint that Congress intended preemption of state public health regulations that may have an effect on the "uniformity," and potentially the "economics" or profitability, of carriers. The First Circuit's boundless reading of the "related to" language in the FAAAA preemption provisions swallows up state police powers, and the appeals court specifically refused to follow this Court's practical interpretation of similar language

found in other statutes such as ERISA. It should come as no surprise, therefore, that the First Circuit's decision also conflicts with the analysis of FAAAA preemption of other circuits. The Second and Ninth Circuit hold that the FAAAA does not preempt a state's exercise of its traditional police powers in noneconomic areas. This Court should grant certiorari and reverse the First Circuit's damaging decision.

I. THE COURT'S REVIEW IS NEEDED BECAUSE THE FIRST CIRCUIT'S DECISION PREVENTS THE STATES FROM REGULATING DELIVERY SALES OF DANGEROUS SUBSTANCES, INCLUDING IN PARTICULAR TOBACCO TO CHILDREN.

Tobacco is just one of many substances controlled by states to protect the public health and safety. Maine, like virtually all states, places controls and restrictions on the sale and delivery of tobacco as well as, *inter alia*, weapons, chemicals, and live animals.[7] State controls rely almost entirely upon requiring retailers to ship dangerous substances in a certain fashion or checking for identifying markings or labels on the outside of the package. By holding a state cannot require a retailer to ship dangerous substances in a particular fashion, such as requiring age verification, or impute knowledge to a carrier it is shipping

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[7] *E.g.*, Ala. Code § 2-14-5 (barring transport of certain products related to bee keeping); Ariz. Rev. Stat. § 3-209 (barring the transport of quarantined produce); Ariz. Rev. Stat. § 13-3102 (barring transport of prohibited weapons); Cal. Bus. & Prof. Code § 17533.9 (barring transport of teargas); Cal. Fish & Game Code § 4800 (barring the transport of mountain lions); N.Y. Penal Law § 190.50 (barring transport of slot machines or other gambling devices). *See also* note 1, *supra*.

such substances from markings or labels, the First Circuit effectively prevents the states from controlling these substances. There is no other manner to effectively regulate delivery sales of dangerous substances to children. Certainly, the First Circuit does not identify any. The appeals court's decision prevents states from controlling the third-party delivery of such substances, a result having grave consequences for the public health and nowhere suggested by Congress.

"[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Federal Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Although there is *no* comprehensive federal tobacco delivery law, every state bans the sale of tobacco to children. Moreover, as this Court recognized in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 552 (2001), "there is an established congressional policy that supports" state laws prohibiting cigarette sales to minors; "Congress has required States to prohibit tobacco sales to minors as a condition of receiving federal block grant funding for substance abuse treatment activities." The *Lorillard* Court pointed to the 1992 Synar Amendment, Pub. L. No. 102-321, Title II, § 202, 106 Stat. 394, which conditions the receipt of federal block grant funding for substance abuse treatment activities on states' enactment and effective enforcement of laws covering the *sale* and *distribution* of tobacco by "any manufacturer, retailer, or distributor." The Synar Amendment specifically mandates that the states "reduce the extent to which tobacco products are available to individuals under the age of 18." 42 U.S.C. § 300x-26(a)(1) & (b)(1). While striking down certain aspects of the Federal Cigarette Labeling and Advertising Act, 15

U.S.C. § 1334(b), the Court approved of state laws that regulate the "sale and distribution of tobacco products" to children, and emphasized that "States and localities also have at their disposal other means of regulating conduct to ensure that minors do not obtain cigarettes." 533 U.S. at 552.

"The presumption against federal pre-emption of a state statute designed to foster public health, has special force when it appears . . . that the two governments are pursuing 'common purposes.'" *See Pharmaceutical Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 666 (2003) (citations omitted). There is no doubt that the federal and state governments have a common purpose in dealing with youth access to tobacco, and that Congress has left and encouraged that regulation to the states.

While the First Circuit stated that the "FAAAA and Synar Amendment can exist harmoniously because the states may pass laws to curb underage smoking without passing laws 'related to' carrier prices, routes, or services," even that court recognized the "tension" and "practical" difficulties of its decision. (App. 28-29). By striking down the Maine law requiring telephone and internet retailers to use a carrier that provides age verification and signature services, the decision allows those retailers to avoid age verification requirements otherwise applicable to over-the-counter retailers. And the decision purports to allow states to prevent carriers from *knowingly* delivering tobacco, but prevents the states from imputing knowledge to the carriers from tobacco markings or labels on a package, the only identified means to proving *knowing* delivery. The appeals court's decision is unworkable and allows telephone and internet retailers to circumvent state law by utilizing carriers to deliver contraband to minors.

The First Circuit decision thus draws into question the underpinnings of this Court's recent holding in *Granholm v. Heald,* 544 U.S. 460 (2005). There, the Court struck down certain state laws regulating youth access to alcohol as discriminatory against out-of-state businesses under the Commerce Clause. In doing so, the Court explained that "the States can take less restrictive steps to minimize the risk that minors will order wine by mail. For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package." *Id.* at 490-91. These requirements are similar to those struck down by the First Circuit. It would be a curious result indeed if the sort of "less restrictive" state public health regulations relied upon in *Granholm* are, in fact, preempted under the FAAAA.

II. THE FIRST CIRCUIT'S PREEMPTION ANALYSIS IS INCORRECT AND NOT CONSISTENT WITH THIS COURT'S DECISIONS.

The First Circuit's decision conflicts with this Court's holdings which give a practical meaning to otherwise boundless "relate to" preemption language. This Court's approach honors the intent of Congress when considering the scope of its preemption of states' police powers. The First Circuit's decision, by contrast, rests upon a broad reading of "related to" that effectively swallows up state contraband delivery laws – even though Congress did not manifest any intent, let alone a clear one, to preempt states' health-related police powers. The First Circuit should have looked directly at the intent of Congress, as identified by this Court, that only state *economic* laws regulating carriers are preempted by the FAAAA. *See City*

of Columbus, 536 U.S. at 441. Congress did not intend to preempt any and all traditional state public health laws that happen to have some effect on the uniformity or economic profitability of carriers.

The FAAAA language that preempts state laws "related to a price, route, or service," 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), on its face is of the same limitless breadth as that found in ERISA that preempts state laws "insofar as they . . . relate to any employee benefit plan," 29 U.S.C. § 1144(a). But the Court has explained in the context of ERISA that the term "relate to" is "unhelpful" and "frustrating," requiring resort to the objectives of the federal legislation. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). The term "relate to" cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." *Id.* at 655; *see also California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("as many a curbstone philosopher has observed, everything is related to everything else."). Under such circumstances, the "preemption claims turn on Congress' intent," not the literal application of "relate to." *Travelers,* 514 U.S. at 655. The First Circuit, however, specifically chose not to apply this common sense approach to similar preemption language in the FAAAA, stating quite clearly that it is up to the Supreme Court, and not the First Circuit, to do so. (App. 16). The Court should take the opportunity to do so here.

Just as there is "nothing in the language of [ERISA] or the context of its passage indicat[ing] that Congress chose to displace general health care regulation, which

historically has been a matter of local concern," *Travelers*, 514 U.S. at 661, so too there is nothing in the language or context of the FAAAA's passage suggesting Congress enacted that law to displace state contraband delivery laws. As noted by this Court, the FAAAA was intended to preempt "the State's economic authority . . . , 'not restrict' the preexisting traditional police power over" safety, *City of Columbus*, 536 U.S. at 439, and obviously public health as well. The conferees referred to this Court's decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), which dealt with similar "relating to" language in the Airlines Deregulation Act (ADA), 49 U.S.C. § 1305(a)(1), as setting forth the level of preemption, but in subsequent pages the conferees repeatedly explained that preemptive effect related to "economic" regulations. H.R. Conf. Rep. No. 103-677, at 83, 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755, 1756, 1258-60. The report went on to explain that the committee's intent was not to preempt state authority to regulate such areas as safety and hazardous material, which is only a "partially identified," not "all inclusive" list, so long as the state regulation is not a "guise for . . . economic regulation." H.R. Conf. Rep. No. 103-677, at 83, 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755, 1756. Regulation in such areas "is not a price, route or service and thus is unaffected." H.R. Conf. Rep. No. 103-677, at 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757. Finally, the conferees noted that several states, including Maine, had none of the problematic laws that were intended to be preempted, H.R. Conf. Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1757, 1758. At that time, Maine had numerous contraband delivery laws on the books. *See* note 1, *supra*.

Thus, it is clear that when it used the broad phrase "related to a price, route, or service," Congress did not intend it to be applied literally – and boundlessly – to preempt state public health laws regulating retailers and carriers regarding delivery of dangerous substances such as tobacco. This Court already has approved of state laws regulating the sale and distribution of tobacco to children, *Lorillard*, 533 U.S. at 552, 571, and state laws requiring adult signature and identifying markings for the delivery of alcohol, *Granholm v. Heald*, 544 U.S. at 490. So long as the state law is not intended to regulate the economics of the carriers, such as setting rates or establishing tariffs, there is no preemption under the FAAAA.

Had the First Circuit applied the correct analysis in this case, it would have found that none of the provisions of Maine law at issue were preempted. Section 1555-C(3)(C) requires retailers to use a delivery carrier that provides age verification and signature services in order to prevent delivery of tobacco to children. First, these are not *economic* regulations – they are intended only to protect the health of children – and therefore are not embraced by the FAAAA's "related to" language. Moreover, this provision does not require a carrier to do anything – it merely requires that a *retailer* use a service that is provided by carriers. As noted, the only carrier to present record evidence, UPS, stated that it offers a type of delivery confirmation, adult-signature-required service, for an additional nominal fee of either $1.75 or $2.75. All section 1555-C(3)(C) requires, therefore, is that retailers use a carrier that chooses to provide the required service. It is difficult to see how that regulates the "service" provided by carriers.

The First Circuit's decision appears to be founded on the notion that this regulation of retailers somehow coerces rival carriers to compete to provide such options, and therefore is "related to" a service. (App. 24). Such a boundless reading of a "related to" preemption provision is precisely what this Court rejected in the ERISA line of cases. Its effect, as a practical matter, is to eliminate any state ability to control how retailers deliver tobacco, alcohol and other substances, a result clearly at odds with pronouncements of this Court and the intent of Congress.

The First Circuit's holding regarding section 1555-D fares no better. On the one hand, the court found that the first part of section 1555-D – which prohibits the knowing delivery of tobacco – is not preempted because that could not possibly have been the intent of Congress. (App. 25-27). On the other hand, the court held that the Maine provision imputing knowledge to a carrier from tobacco markings and labels – the only identified means to establish a *knowing* delivery – *is* preempted. (*Id.* at 27-28). The appeals court acknowledged the "tension" in its decision and the "practical" difficulties for the State to prove its case. (*Id.* at 28-29). Simply put, if a State cannot impute knowledge to a carrier from a tobacco marking or label – even though UPS stated that it already checks the outside of packages for other markings, labels and signs of damage – the "practical" difficulties of enforcing Maine's law are in reality insurmountable.

If the First Circuit were true to its reading of "related to," it would have struck down the first part of section 1555-D as well, but even that court realized Congress could not have intended to bar the states from controlling contraband. Instead, the appeals court upheld *in theory* a state's authority to regulate delivery of tobacco, but struck

down the only means to exercise that authority. As that authority rests upon the state's health-related police powers, and not economic regulation, the appeals court decision not only is unworkable but is in direct contravention of this Court's holdings and Congress' intent.

III. THE FIRST CIRCUIT'S DECISION IS INCONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS WELL AS LOWER COURTS.

The First Circuit's view of FAAAA preemption is markedly at odds with that of the Ninth and Second Circuits, as well as several lower courts. In *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999), the Ninth Circuit concluded that certain California prevailing wage laws, which were alleged to increase prices by 25 percent and to compel rerouting of equipment, were not preempted by the FAAAA. Plaintiffs argued that the FAAAA preempted the state prevailing wage law because it "directly affects, and therefore is 'related to' the prices, routes, and services of" plaintiffs. *Id.* at 1189. The Ninth Circuit found that California's wage laws were "state action in a field long regulated by the states," and do not "fall[] into the 'fields of laws' regulating prices, routes, or services," finding that nowhere in the FAAAA is there any "mention of Congress's intent to occupy the field of general prevailing wage laws." *Id.* at 1189 & n.6. Obviously, the First Circuit takes the opposite view of the FAAAA – although there is no mention of a Congressional intent to preempt state public health laws, the appeals court held that such an intent is presumed from the "related to" language.

In reviewing the legislative history, the Ninth Circuit noted that Congress identified 41 jurisdictions "which regulated intrastate prices, routes and services, followed by ten jurisdictions which did not regulate in those areas." *Id.* at 1187, relying upon H.R. Conf. Rep. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1758. Seven of the latter ten jurisdictions, including Maine, had prevailing wage laws at the time of FAAAA's enactment. *Id.* at 1187 & n.3. The appeals court found this constitutes "indirect evidence that Congress did not intend to prevent" prevailing wage laws, a "perception reinforced by the absence of any *positive* indication in the legislative history that Congress intended preemption in this area of traditional state power." *Id.* at 1188. Similarly, Maine was identified by the conferees as a state with no problematic laws; although Maine had substance delivery laws on the books when the FAAAA was enacted (*see* note 1, *supra*), the First Circuit ignored this key consideration.

The appeals courts also disagree regarding the interplay between the interpretations of the similar "related to" preemption language of the FAAAA, Airline Deregulation Act ("ADA"), and ERISA. The Ninth Circuit read *Morales* and *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 234-35 (1995), both of which dealt with the ADA, as not establishing a rigid and boundless rule of preemption, and incorporated into its FAAAA analysis this Court's practical approach toward preemption found in subsequent ERISA cases "to preserve the proper and legitimate balance between federal and state authority." *Mendonca*, 152 F.3d at 1188-89. The First Circuit read *Morales* and *Wolens* as requiring courts only to "focus . . . on the *effect* that the state law has on . . . operations," and, as noted previously,

specifically declined to apply this Court's ERISA analysis to the FAAAA. (App. 15-20).

Subsequently, in *Ace Auto Body & Towing, Ltd. v. City of New York,* 171 F.3d 765 (2d Cir. 1999), the Second Circuit dealt with the scope of the FAAAA's tow truck exception to preemption, deciding that certain New York City towing regulations were not preempted by the FAAAA. That appeals court, like the Ninth Circuit, began with the basic proposition that a state's historic police powers are not superseded unless that was the "clear and manifest purpose of Congress." *Id.* at 771. The Second Circuit found that FAAAA preempts *economic* regulation, and applied the "common sense" approach towards preemption from its ERISA cases. *Id.* at 773-74. Again, the First Circuit takes the opposite approach.

Three lower courts have directly found tobacco contraband and delivery laws not to be preempted by the FAAAA. In *New York State Motor Truck Assoc. v. Pataki,* 2004 U.S. Dist. Lexis 25519 (S.D. N.Y. 2004), the court rejected a claim that the FAAAA facially preempted New York's law mandating, *inter alia*, that if the carrier transported cigarettes to a home or residence, the carrier is presumed to know that such person was not a statutorily authorized recipient. In *Ward v. New York,* 291 F. Supp. 2d 188 (W.D. N.Y. 2003), brought by tobacco retailers and manufacturers, the court denied a motion for a temporary restraining order against enforcement of that law, concluding plaintiffs' FAAAA preemption claim was not likely to succeed. The courts concluded that Congress was concerned with "state economic regulation," not public health laws. *Pataki,* 2004 U.S. Dist. Lexis 25519, at *16; *Ward,* 291 F. Supp. 2d at 209-10. The *Pataki* court put it best, holding "there is nothing within the body of the federal

law or in the legislative history suggesting Congress intended to usurp the states' power to regulate the manner in which cigarettes are shipped into their borders in order to protect their citizenry from the pernicious effects of tobacco which negatively impacts on the states' economy." *Pataki*, 2004 U.S. Dist. Lexis 25519, at *21.

Finally, in *Robertson v. State of Washington Liquor Control Board*, 10 P.3d 1079 (Wash. App. Ct. 2000), the court rejected a claim that Washington's law governing the forfeiture of unstamped cigarettes was preempted by the FAAAA. Using reasoning similar to that of the New York district courts, the Washington court upheld the Washington law even though it did have an impact on the use of plaintiff's truck to haul contraband cigarettes, noting that if the FAAAA preempted state laws prohibiting the "service" of transporting contraband, "a motor carrier would be exempt from forfeiture for transporting a methamphetamine lab, poached game, or contraband cigarettes." *Id.* at 858. The First Circuit's decision draws that obvious and correct conclusion into question.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION; MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC.; VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, Appellees, v. G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant, Appellant.

No. 05-2136.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

448 F.3d 66; 2006 U.S. App. LEXIS 12264

May 19, 2006, Decided

COUNSEL: Paul Stern, Deputy Attorney General, with whom G. Steven Rowe, Attorney General, Melissa Reynolds O'Dea, Peter B. LaFond, and Christopher C. Taub, Assistant Attorneys General, Office of the Attorney General, were on brief, for appellant.

Ruth N. Borenstein, with whom Paul T. Friedman, Lawrence R. Katzin, Morrison & Foerster LLP, Michael A. Nelson and Jensen Baird Gardner & Henry, were on brief, for appellees.

JUDGES: Before BOUDIN, Chief Judge, STAHL, Senior Circuit Judge, and HOWARD, Circuit Judge.

OPINION BY: HOWARD

OPINION:

HOWARD, Circuit Judge. In 2003, Maine enacted a law to restrict and regulate the sale and delivery of tobacco products purchased via the internet or other electronic means. Several trade associations, representing air and motor carriers of property, brought this action against the

Maine Attorney General alleging that certain provisions of this law are preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA). The district court granted summary judgment for the associations and enjoined Maine's Attorney General from enforcing the law. We affirm in all respects but one.[1]

I.

A. The FAAAA

There are two FAAAA preemption provisions at issue in this case. *See* Pub. L. No. 103-305, § 601; 108 Stat. 1569. The first provides that a "State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The second states that a "State may not enact or enforce a law . . . related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle. . . ." 49 U.S.C. § 41713(b)(4)(A).

These provisions combine to bar states (subject to certain exceptions discussed later) from enacting laws related to prices, routes, or services of air or motor carriers of property. They are "intended to function in the exact same manner with respect to [their] preemptive effects." H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757.

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[1] We are grateful for the amicus curiae briefs filed by several state attorneys general, the American Trucking Association, the Federal Express Corporation and the United States Chamber of Commerce.

B. The Maine Tobacco Delivery Law

In 2003, the Maine Legislature adopted "An Act to Regulate the Sale of Tobacco Products and to Prevent the Sale of Cigarettes to Minors." *See* L.D. 1236 (121st Maine Leg.) (codified at 22 M.R.S.A. §§ 1551, 1555-C & 1555-D) (Tobacco Delivery Law). The Tobacco Delivery Law was prompted by the recent increase in internet tobacco sales which are consummated by direct delivery to consumers through the mail or by commercial carriers. *See* Testimony of Representative Glen Cummings Before the Joint Standing Committee on Health & Human Services (Apr. 29, 2003). This phenomenon has complicated Maine's efforts to regulate "the sale of tobacco products to minors" and caused it to lose "tremendous tax revenues as a result of tax free sales by unlicensed companies." *Id.* The associations persuaded the district court that §§ 1555-C(3)(C) & 1555-D are preempted by the FAAAA.

1. § 1555-C(3)(C)

Maine's Tobacco Delivery Law permits a licensed tobacco retailer to sell tobacco products[2] directly to consumers via the internet or other electronic means so long as the retailer takes specified steps to ensure that sales are not made to minors. *See id.* §§ 1555-C(2) & (3). One such step requires the retailer to use a carrier that will ensure that: (1) the purchaser of the tobacco products is the same person as the addressee of the package; (2) the

[2] Tobacco products are broadly defined to include "any form of tobacco and any material or device used in the smoking, chewing, or other form of tobacco consumption, including cigarette papers and pipes." 22 M.R.S.A. § 1551(3).

addressee is of legal age to purchase tobacco products and sign for the package; and (3) if the addressee is under 27 years of age, that she show a valid government-issued identification verifying that she is old enough to purchase tobacco products. *Id.* § 1555-C(3)(C). Penalties are imposed only against the retailer for violations of this provision. *See id.* §§ 1555-C(3)(E) & (F).

2. § 1555-D

Section 1555-D makes it illegal for any person to knowingly deliver tobacco products to a Maine consumer if the products were purchased from an unlicensed retailer.[3] The section also states that a person delivering a package "is deemed to know" that the package contains tobacco products if it (1) so indicates on any side other than the side directly opposite the label, *see* Code of Me. R. ch. 203, § 11, or (2) was shipped by a person listed by the Attorney General as an unlicensed tobacco retailer.[4]

C. The Effect of the Tobacco Delivery Law on United Parcel Service (UPS)

As discussed in further detail below, one way for the associations to prove that the challenged provisions of the Tobacco Delivery Law are preempted by the FAAAA is to demonstrate that they have a forbidden significant effect

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[3] It does not, however, bar the delivery of tobacco products purchased from an unlicensed retailer to a licensed tobacco retailer or distributor operating in Maine. *See id.*

[4] The Attorney General maintains a list of unlicensed tobacco retailers that he distributes to carriers operating in Maine. 22 M.R.S.A. § 1555-D (2).

on carrier services. *See infra* at 25. The associations have attempted to make this showing by highlighting the effect of the challenged provisions on UPS, a motor/air carrier of property operating in Maine.[5]

UPS, which delivers approximately 65,000 packages per day in Maine, offers door-to-door delivery service of packages and delivery of packages on an express basis. Its delivery operations function as an integrated system, requiring extensive planning and coordination among its operating facilities and ground and air fleet. Delays and disruptions in the sorting and delivery of packages can affect the timely delivery of thousands of packages within the UPS system.

Prior to the enactment of § 1555-C(3)(C), UPS did not require that its drivers deliver a package only to the addressee, and it did not require a signature from the recipient of the package unless the shipper paid a premium for this additional service. UPS determined that it would not be feasible to alter its delivery operations to provide these new services in Maine, so it stopped delivering all tobacco products to Maine consumers.

To make deliveries of tobacco products to licensed retailers and distributors in Maine as permitted by § 1555-D, UPS now has modified its uniform package delivery procedures to identify packages that contain tobacco products. UPS requires that its preloaders in Maine (the employees who place the packages on the trucks for delivery) specially examine each package to determine if it

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[5] While the associations rely on UPS' experience to prove that the Tobacco Delivery has a forbidden significant effect on carriers, UPS is not a party to this action.

is marked as containing tobacco or if the name of the addressee or shipper indicates that the package likely contains tobacco.[6] Packages identified as likely containing tobacco products are then segregated so that UPS employees can research whether the package is destined for a licensed tobacco retailer or distributor. If UPS determines that the addressee is not a licensed tobacco retailer or distributor, it arranges to return the package to the shipper or otherwise to dispose of the package.

D. The District Court Decision

Proceeding from the premise that the FAAAA preempts a state law if it "expressly references" a carrier's prices, routes, or services or has a "forbidden significant effect" on the same, the district court concluded that the challenged provisions of the Tobacco Delivery Law are preempted by the FAAAA. *See N.H. Motor Transp. Ass'n v. Rowe,* 377 F. Supp. 2d 197, 210 (D. Me. 2005) (citing *United Parcel Serv., Inc. v. Flores-Galarza,* 318 F.3d 323, 334-35 (1st Cir. 2003) (*UPS I*)). The court determined that, while § 1555-C(3)(C) did not expressly reference carrier services because that section is directed only at retailers of tobacco products, it has a forbidden significant effect on UPS because, for the carrier to accept packages containing tobacco for delivery in Maine, it would have to adopt procedures that would "alter [its] delivery practices" for these packages. *Id.* at 216.

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[6] UPS does not cross-reference packages against the Attorney General's list to determine if the shipper is listed as an unlicensed tobacco retailer.

The court also ruled that § 1555-D both expressly references and has a forbidden significant effect on carrier services. It concluded that the provision expressly references services because it prohibits carriers from delivering a certain class of tobacco products, i.e., tobacco products purchased by Maine consumers from unlicensed retailers. *See id.* at 211-12. It also concluded that the provision also has a forbidden significant effect because it forced UPS to depart from "its nationally uniform procedure" by inspecting each package to identify the contents. *Id.* at 212. The Attorney General timely appealed from this ruling.[7]

II.

A. Jurisdiction

Before reaching the merits of the Attorney General's appeal, we consider two threshold jurisdictional issues. The Attorney General asserts that the associations lack standing and that the action is moot in light of events occurring subsequent to the noticing of the appeal.

1. Standing

The associations invoke the representational standing doctrine recognized by the Supreme Court in *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). Under this doctrine, "an association has standing to bring suit on behalf

[7] The district court found that another section of the Tobacco Delivery Law, which requires the shipper of tobacco products to inform the carrier of the age of the purchaser, was not preempted. *Id.* at 217 (citing 22 M.R.S.A. § 1555-C(3)(A)). The associations have not cross-appealed from this ruling.

of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individualized members in the lawsuit." *Id.*

The Attorney General focuses his argument on the third *Hunt* factor. He contends that evidence concerning the effect that the challenged provisions of the Tobacco Delivery Law have on UPS suffices only to justify preemption of the challenged provisions as to UPS. Preemption against other carriers should occur only to the extent that the other carriers individually prove that the challenged provisions have a forbidden significant effect on their prices, routes, or services.

The district court rejected this argument, observing that "[a]ssociational standing is . . . granted in cases seeking injunctive relief rather than damages, because individualized proof is not necessary and the relief usually inures to the benefit of all members injured." *N.H. Motor Transp. Ass'n v. Rowe,* 324 F. Supp. 2d 231, 236 (D. Me. 2004). Because the associations only sought an injunction and a declaratory judgment against the challenged provisions, the court ruled that the third *Hunt* factor was satisfied. *See id.* at 236 (citing *Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R.,* 906 F.2d 25, 35 (1st Cir. 1990)).

After the district court issued this ruling, we clarified the requirements for establishing the third *Hunt* factor. In so doing, we acknowledged that "there is no well developed test in this circuit as to how the third prong of the *Hunt* test . . . applies in cases where injunctive relief is sought." *Pharmaceutical Care Mgmt. Ass'n v. Rowe,* 429 F.3d 294,

313-14 (1st Cir. 2005). But we did not embrace the proposition that, under *Playboy Enters.* the third *Hunt* factor is always satisfied where an association seeks injunctive relief on behalf of all of its members. *See Rowe,* 429 F.3d at 314 ("*Playboy* is not an open door for association standing in all injunction cases where member circumstances differ and proof of them is important."). We concluded that representational standing is inappropriate if adjudicating the merits of an association's claim requires the court to engage in a "fact-intensive-individual inquiry." *Id.* (quoting *Penn. Psychiatric Soc. v. Green Spring Health Servs., Inc.,* 280 F.3d 278, 287 (3d Cir. 2002)). We therefore turn to whether the associations' preemption claim requires a sufficiently fact-intensive inquiry to preclude representational standing.

The FAAAA provides that a state law is preempted if it relates to the prices, routes, or services of "*any* motor carrier" or "*an* air carrier." 49 U.S.C. §§ 14501(c) & 41713(b)(4)(A) (emphases supplied). "Any" means "one ... of whatever kind," and "an" means "one." *Merriam Webster's Collegiate Dictionary* at 40, 53 (10th ed.2001). The language of the FAAAA accordingly suggests that, if a state law is preempted as to one carrier, it is preempted as to all carriers.[8] *See N.H. Motor Transp. Ass'n,* 377 F. Supp. 2d at 219. Such a reading accords with one of the FAAAA's central purposes: to establish a "level playing field" among carriers. H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757; *see Californians for Safe Dump*

[8] Even if "an" as used in § 41713(b)(4)(A) is ambiguous, "any" as used in § 14501(c) is clear, and Congress has emphasized that these provisions were intended to "function in the exact same manner." H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757.

Truck Transp. v. Mendonca, 152 F.3d 1184, 1187 (9th Cir. 1998). If preemption were judged on a carrier-specific basis, the result would be a "patchwork" of state laws applying to some carriers and not to others, depending on which carriers proceeded to litigation. H.R. Conf. Rep. 103-677 at 87 *reprinted in* 1994 U.S.C.C.A.N. at 1759. Such a result would undermine Congress' goal of encouraging uniformity in carrier regulation. Thus, the associations can prevail by establishing that the challenged provisions of the Tobacco Delivery Law have a forbidden significant effect on one carrier. The district court correctly ruled that the associations have standing to press their preemption claim. *See Rowe*, 429 F.3d at 314.[9]

2. Mootness

After the district court granted summary judgment, UPS settled an enforcement action brought by the New York Attorney General under a New York law restricting the ability of carriers to deliver cigarettes to consumers. *See* N.Y. Pub. Health Law § 1399-ll(2) (McKinney 2001). In that settlement, UPS promised to stop "shipping cigarettes to individual consumers in the United States while still permitting lawful shipments of cigarettes to licensed tobacco businesses." To fulfill this promise, UPS agreed (1) to identify all shippers that may be cigarette retailers and

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[9] The Attorney General also argues that representational standing should not be allowed because "the increased use of [representational] standing by large businesses [makes] the defense of suits . . . more difficult by controlling discovery and access to information." We do not foreclose the possibility that representational standing may be improper in a particular case because of some hardship imposed on a defendant in conducting discovery. But the Attorney General has not attempted to demonstrate such a hardship here.

advise them that UPS will not accept cigarettes for delivery to consumers; (2) to discipline shippers that violate UPS's non-delivery policy; (3) to impose measures to ensure that employees "actively" look for indications that a package contains cigarettes; and (4) to instruct drivers not to deliver cigarette packages to consumers.

The Attorney General argues that, as a result of the settlement, this appeal has become moot, the judgment should be vacated and the case should be dismissed. *See Duke Power Co. v. Greenwood County,* 299 U.S. 259, 267, 57 S. Ct. 202, 81 L. Ed. 178 (1936) (stating that where a case becomes moot while on appeal, the appellate court must set aside the judgment and remand the case with instructions that it be dismissed). He contends that, by agreeing not to deliver cigarettes directly to consumers throughout the United States and directing employees actively to look for cigarettes, UPS is no longer affected by the Tobacco Delivery Law.

Article III considerations require that an actual case or controversy exist between the parties throughout the course of litigation. *See Ramirez v. Sanchez Ramos,* 438 F.3d 92, 100 (1st Cir. 2006). A case must be dismissed as moot "if, at some time after the institution of the action, the parties no longer have a legally cognizable stake in the outcome." *Goodwin v. C.N.J., Inc.,* 436 F.3d 44, 46 (1st Cir. 2006). This rule applies even where the case becomes moot while pending on appeal. *See Great Western Sugar Co. v. Nelson,* 442 U.S. 92, 93, 99 S. Ct. 2149, 60 L. Ed. 2d 735 (1979) (per curiam). But "[t]he burden of establishing mootness rests squarely on the party raising it, and the burden is a heavy one." *Mangual v. Rotger-Sabat,* 317 F.3d 45, 60 (1st Cir. 2003) (citation omitted). To establish mootness, the party raising it must show that the court cannot

grant any "effectual relief whatever" to its opponent. *Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992).

The Attorney General has not met this heavy burden. The New York settlement agreement applies only to the delivery of cigarettes, but the Tobacco Delivery Law applies to "any form of tobacco and any material or device used in the smoking, chewing or other form of tobacco consumption." 22 M.R.S.A. § 1551-3. UPS could therefore adhere to the terms of the settlement agreement and nevertheless violate the Tobacco Delivery Law by unlawfully delivering non-cigarette tobacco products. Because enjoining the challenged provisions would permit UPS to deliver *all* tobacco products, effectual relief remains available.

B. Preemption

We turn now to the merits of the district court's preemption ruling. We review the ruling de novo, considering the record and all reasonable inferences in the light most favorable to the Attorney General. *See Mullin v. Raytheon Co.,* 164 F.3d 696, 698 (1st Cir. 1999). We may affirm on any ground revealed by the record. *See Houlton Citizens' Coalition v. Houlton,* 175 F.3d 178, 183-84 (1st Cir. 1999).

The Attorney General presents two arguments for reversal. First, he contends that the FAAAA does not preempt state laws enacted pursuant to a state's police power to protect the health and welfare of its citizens. The Attorney General asserts that the FAAAA preempts only state laws that impose traditional economic regulation on carriers – *e.g.* entry and commodity controls, tariff filing

requirements, and price ceilings. Because the Tobacco Delivery Law does not impose such traditional economic restrictions, the Attorney General argues that the FAAAA does not apply. Alternatively, the Attorney General contends that, even if the Act applies, neither challenged provision is "related to" carrier services within the meaning of the FAAAA.

1. Applicability of the FAAAA to a State's Police-Power Enactments

A fundamental tenet of our federalist system is that constitutionally enacted federal law is supreme to state law. *See* U.S. Const. Art. VI. cl. 2. As a result, federal law sometimes preempts state law either expressly or by implication. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). "Express preemption occurs when Congress has unmistakably . . . ordained that its enactments alone are to regulate a subject and state laws regulating that subject must fall." *Mass. Ass'n of Health Maintenance Organizations v. Ruthardt,* 194 F.3d 176, 179 (1st Cir. 1999) (citation omitted). In every preemption case, "the purpose of Congress is the ultimate touchstone." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). The primary focus is on the "plain wording" of the statute because the text "contains the best evidence of Congress' pre-emptive intent." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 62, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002). But "[a]lso relevant is the structure and purpose of the statute as a whole as revealed . . . through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme

to affect business, consumers and the law." *Medtronic,* 518 U.S. at 486.[10]

We begin with the text. As mentioned above, the FAAAA prohibits states from enacting laws "related to a price, route, or service" of a carrier. 49 U.S.C. §§ 14501(c) & 41713(b)(4)(A). This language was patterned after the preemption provision of the Airline Deregulation Act of 1978. *See* H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. 1757, 1759; *Mendonca,* 152 F.3d at 1184; *Desardouin v. United Parcel Serv., Inc.,* 285 F. Supp. 2d 153, 162 (D. Conn. 2003). Therefore, in addition to cases interpreting the FAAAA, we look to cases interpreting the Airline Deregulation Act. *UPS I,* 318 F.3d at 335-36; *Mastercraft Interiors, Ltd. v. ABF Freight Sys., Inc.,* 284 F. Supp. 2d 284, 287 (D. Md. 2003).

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[10] The parties devote a great deal of argument to whether we should conduct our preemption analysis with a presumption against preemption because the state law at issue was enacted to further Maine's police-power interest. *See Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) (stating that a preemption analysis starts "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"). The circumstances in which the presumption is to apply are not altogether clear. *Compare Medtronic,* 518 U.S. at 485 (stating that the presumption against preemption applies "in all preemption cases") *with United States v. Locke,* 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000) (holding the presumption inapplicable where "the State legislates in an area where there has been a history of significant federal presence"). In any event, the presumption can be overcome where the congressional purpose is sufficiently clear. *See Egelhoff v. Egelhoff* 532 U.S. 141, 151, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001). For the reasons discussed *infra,* we think that the congressional intent to preempt state police-power enactments that are related to carrier prices, routes, or services is sufficiently clear to overcome any presumption that would apply here.

The seminal case is *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). Like the FAAAA, the version of the Airline Deregulation Act considered in *Morales* preempted state laws "relating to rates, routes or services of any air carrier." [11] The Court identified "relating to" as the key phrase in determining the breadth of the preemption provision and concluded that the "words . . . express a broad pre-emptive purpose." *Id.* at 383. It relied on several cases in which the Court had interpreted a similarly-worded provision of the Employment Retirement Security Act of 1974 (ERISA) preempting all state laws that "relate to" an employee benefit plan. *Id.* at 384. The *Morales* Court emphasized that this language had an "expansive sweep" and that it was "conspicuous for its breadth." *Id.* In light of Congress' use of similarly broad language, the Court concluded that Congress intended the Airline Deregulation Act to preempt any state law that has "a connection with or reference to airline rates, routes, or services." *Id.*

The FAAAA's drafters were familiar with *Morales* and approved of its reasoning. The Conference Committee Report explains that "the conferees [did] not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*. . . ." H.R. Conf. Rep. 103-677 at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755. The sweep of the FAAAA's text and the drafters' expressed intent to use *Morales* as a roadmap are strong evidence that the FAAAA was not intended to preempt

[11] In 1994 Congress replaced "relating" with "related" and "rates" with "price" but did not intend these revisions to substantively change the law. *See* Pub. L. No. 103-272, § 1(a); 108 Stat. 745. This provision is currently codified at 49 U.S.C. § 41713(b)(1).

only a narrow class of economic regulations while excluding the many laws enacted by the states under their police powers. If Congress had such a limited purpose in mind, it likely would have employed narrower language in fashioning the FAAAA preemption provisions. *Cf. Botz v. Omni Air Int'l*, 286 F.3d 488, 493-94 (8th Cir. 2002) ("Although Congress could easily have selected more restrictive terminology to describe the type of . . . enactment the [Airline Deregulation Act] pre-empts, the provision as written is without language that would produce a more limited pre-emptive effect.").

The Attorney General argues that we should disregard *Morales* because, post-*Morales*, the Supreme Court has narrowed its understanding of ERISA's "relat[ing] to" language. We previously rejected this identical argument:

> The Secretary argues that the broad preemption standard adopted in *Morales* has been overruled by a number of Supreme Court cases narrowing the preemptive effect of [ERISA]. While the *Morales* Court undoubtedly took its interpretive cues from the ERISA preemption jurisprudence then in existence, it does not follow that any change in the ERISA law necessitates a parallel change in the law affecting . . . carriers. As Judge Easterbrook has put it: [I]f developments in pension law have under-cut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustments. Our marching orders are clear: follow decisions until the Supreme Court overrules them.

UPS I, 318 F.3d at 335 n. 19 (quoting *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 608 (7th Cir. 2000)). Absent extraordinary circumstances not present here, we are not at liberty to disregard this ruling. *See United*

States v. Wogan, 938 F.2d 1446, 1449 (1st Cir. 1991) ("We have held, time and again, that in a multi-panel circuit, prior panel decisions are binding upon newly constituted panels in the absence of supervening authority sufficient to warrant disregard of established precedent.").

We look also to the FAAAA's structure and legislative history. The FAAAA includes a series of exceptions to the general preemption rule. The excepted areas are:

> the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. §§ 14501(c)(2) & 41713(b)(4)(B)(i). The Attorney General acknowledges that the challenged provisions of the Tobacco Delivery Law do not fall within any of these exceptions. He contends, however, that these statutory exceptions suggest broader congressional purpose to permit states to regulate carriers to protect citizen health and safety. The Attorney General points to a passage from the FAAAA's legislative history indicating that the enumerated exceptions were "not intended to be all inclusive," H.R. Conf. Rep. 103-677 at 84, *reprinted in* 1994 U.S.C.C.A.N. at 1756, to argue that we may establish an additional exception to FAAAA preemption for laws enacted pursuant to a state's police power to protect the health and welfare of its citizens.

We have cautioned that an overly broad interpretation of the FAAAA exceptions "would swallow the rule of

preemption." *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 14 (1st Cir. 2004) (*UPS II*). An exclusion from preemption for police-power enactments would surely "swallow the rule of preemption," as most state laws are enacted pursuant to this authority. *Id.* The exceptions preserving the states' authority to regulate motor vehicles do not support the Attorney General's argument. *See id.* (rejecting an argument that the FAAAA preemption exceptions indicate a congressional intent to preserve state authority over safety issues generally).

While the statute's structure does not support the Attorney General's police-power argument, there is some support in the legislative history for his view that the FAAAA preempts only state economic regulation. The Conference Committee Report observed that "[s]tate economic regulation of motor carriers . . . is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757. The conferees identified "typical forms" of harmful regulation to include "entry controls, tariff filing, price regulation," and regulation of the "types of commodities carried." *Id.* at 1758. This history led the Supreme Court to remark that "the problem to which the [FAAAA] congressional conferees attended was state economic regulation." *Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 440, 122 S. Ct. 2226, 153 L. Ed. 2d 430 (2002). This history, however, does not indicate that preempting economic regulation was the FAAAA's only purpose. And, in any event, the legislative history cannot trump the statute's text. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (declining to adopt a limited interpretation of a preemption

provision suggested by legislative history because "the language of the [cigarette labeling] Act plainly reaches" further); *Morales,* 504 U.S. at 385 n.2. (The "legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."). Congress often acts to address a specific problem but ultimately settles on a broader remedy. *See Penn. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 213, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.").

In addition, the legislative history reveals a second goal for FAAAA preemption which is inconsistent with the Attorney's General argument: "to create a completely level playing field between air carriers . . . on the one hand and motor carriers on the other." H.R. Conf. Rep. 103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757. In other words, the conferees intended the scope of FAAAA and Airline Deregulation Act preemption to be coterminous. *See Ace Auto Body & Towing Ltd. v. City of New York,* 171 F.3d 765, 772 (2d Cir. 1999); *Mendonca,* 152 F.3d at 1187.

In the Airline Deregulation Act context, the Supreme Court has focused on the effect that a state law has on carrier operations, not on the state's purpose for enacting the law. In *Morales,* the Court found that the Airline Deregulation Act preempted a directive promulgated by several state attorneys general informing airlines that certain advertising practices would be considered to violate state consumer-protection laws. 504 U.S. at 379. And, in *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 227-28, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995), the Court

held that the Airline Deregulation Act preempted a cause of action under the Illinois Consumer Fraud Act concerning the redemption of frequent-flier miles. In both cases, the Court's preemption analysis centered on the impact that the challenged state laws had on airline services and rates and not on the fact that the preempted laws were enacted pursuant to the states' police power to combat consumer fraud. *See Fla. Lime & Avocado Growers v. Paul,* 373 U.S. 132, 150, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963) (describing the traditional state authority to pass laws to combat consumer fraud). The Court reached these conclusions over dissents by Justice Stevens arguing (similarly to the Attorney General here) that the state laws at issue should not be preempted because there was insufficient evidence of congressional intent to preempt state police-power enactments. *See Am. Airlines,* 513 U.S. at 235-31 (Steven, J. dissenting in part); *Morales,* 504 U.S. at 419-27 (Stevens, J., dissenting).

Morales and *American Airlines* thus teach that, under the Airline Deregulation Act, the focus should be on the *effect* that the state law has on airline operations. Accepting the Attorney General's argument would shift the analysis under the FAAAA away from that state law's effect and towards the state's *purpose* for enacting the law. A purpose-related limitation on FAAAA preemption would thus inevitably create a gap between the scope of FAAAA and Airline Deregulation Act preemption – a gap which the FAAAA drafters sought to avoid.

In the end, the Attorney General's argument founders because it cannot be reconciled with the FAAAA's text. The Act's drafters chose to express the preemptive scope of the FAAAA in words that they understood to be exceedingly broad. In the preemption context, we are to give effect to

the ordinary meaning of a congressional enactment "unless there is good reason to believe that Congress intended the language to have some more restrictive meaning." *Cipollone,* 505 U.S. at 521. We do not find a sufficiently compelling basis in either the structure or history of the FAAAA to interpret the Act contrary to its "deliberately expansive text." *Morales,* 504 U.S. at 384. We therefore conclude that the FAAAA preempts state police-power enactments to the extent that they are "related to" a carrier's prices, routes, or services.[12]

2. FAAAA Preemption of the Tobacco Delivery Law

We turn now to whether the challenged provisions of the Tobacco Delivery Law are preempted because they are "related to" carrier services. The parties do not contest that carriers provide the service of delivering "packages on an express or time-guaranteed basis." *See N.H. Motor*

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[12] The Attorney General offers a narrower argument for excluding from FAAAA preemption state laws intended to address underage smoking. He cites the Synar Amendment, a federal law conditioning the states' receipt of certain federal funds on their enacting laws to ban the sale of tobacco products to minors. *See* 42 U.S.C. § 300x-26. The Attorney General contends that the Synar Amendment demonstrates Congress' intent that the states be able to regulate the delivery of tobacco products irrespective of the FAAAA. We disagree. The Synar Amendment indicates Congress' intent that the states take the lead in addressing the underage smoking problem. But the Attorney General has not identified any evidence that Congress intended the states do so in derogation of other federal laws. The FAAAA and Synar Amendment can exist harmoniously because the states may pass laws to curb underage smoking without passing laws "related to" carrier prices, routes, or services. *See UPS I,* 318 F.3d at 333-34 (stating that courts should endeavor to read congressional enactments in harmony whenever possible).

Transp. Ass'n, 377 F. Supp. 2d at 209 (quoting *UPS I,* 318 F.3d at 336). But they disagree over whether the challenged provisions are "related to" this service.

We have previously interpreted the phrase "related to" as used in the FAAAA:

> The phrase "related to" has a broad meaning in ordinary usage: to stand in some relation; to have bearing or concern; to pertain; refer; to bring in association or connection with. When used in a preemption provision, such as [in the FAAAA], it has a similarly broad reach. State laws and regulations having a connection with or reference to a . . . carrier's . . . services are preempted under the [FAAAA]. A sufficient nexus exists if the law expressly references the . . . carriers' . . . services or has a forbidden significant effect on the same.

UPS I, 318 F.3d at 335. We therefore consider whether the district court correctly concluded that the challenged provisions of the Tobacco Delivery Law either expressly reference carrier services or have a forbidden significant effect on UPS' services.

We begin with § 1555-C(3)(C). As set forth above, this statute requires tobacco retailers seeking to ship tobacco products directly to Maine consumers to use only carriers that deliver the package directly to the addressee/purchaser, require a signature from the addressee/purchaser, and conduct age verification if the addressee/purchaser is under 27 years of age. Another section penalizes retailers that use carriers that do not provide these services. 22 M.R.S.A. §§ 1555-C(3)(E) & (F).

Section 1555-C(3)(C) expressly references a carrier's service of providing the timely delivery of packages. The statute prescribes the method by which a carrier operating in Maine must deliver packages containing tobacco products in a way that would affect the ability of the carrier to meet package-delivery deadlines. Delays in searching for the purchaser, making multiple delivery attempts if the purchaser cannot be located, obtaining the purchaser's signature, and verifying the purchaser's age all could affect timely deliveries. *See UPS I,* 318 F.3d at 336 (finding that the FAAAA preempted a state law that "affect[ed] the timeliness and effectiveness" of a carrier's service).

The Attorney General responds that there is no FAAAA preemption because § 1555-C(3)(C) regulates *retailers* of tobacco products and not carriers. He also argues that we should decline to find preemption because any carrier can avoid the requirements of § 1555-C(3)(C) by declining to provide tobacco-product deliveries to Maine consumers.

The Attorney General's first argument amounts to a claim that there can be no FAAAA preemption unless the state law imposes a direct regulation on carriers. This argument cannot be squared with the FAAAA's text because it reads the broad phrase "related to" out of the statute and replaces it with the narrower term "regulates." *See Morales,* 504 U.S. at 385. (rejecting an argument that would have read "relating to" out of the Airline Deregulation Act and replaced it with "regulate"); *UPS I,* 318 F.3d at 335 (rejecting an argument for narrowing scope of the FAAAA that "would read 'the related to language' out of the statute").

Moreover, limiting preemption to direct regulation of carriers is inconsistent with the FAAAA's purpose to bar

states from policing carrier operations. *See Am. Airlines*, 513 U.S. at 228. A state may use its coercive power to cause carriers to conform to state-imposed rules in at least two ways: it may directly regulate carriers or it may limit retailers to hiring only those carriers that comply with the state-imposed mandates. Either way the state is employing its coercive power to police the method by which carriers provide services in the state. In short, the Attorney General's argument would lead to the untenable result of permitting states to regulate carrier services indirectly by regulating shippers. *Cf. Abington Sch. Dist. v. Schemp*, 374 U.S. 203, 230, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (declining to adopt an interpretation that would permit states to do indirectly what they cannot do directly).

The Attorney General's alternative argument – that there is no preemption because a carrier can forgo certain tobacco-product deliveries in Maine – also fails. Declining to find preemption simply because a carrier can limit its in-state business to avoid a particular requirement would undermine the FAAAA's goal of creating an environment in which "[s]ervice options will be dictated by the marketplace," and not by state regulatory regimes. H.R. Conf. Rep. 103-677 at 88, *reprinted in* 1994 U.S.C.C.A.N. at 1760. The district court correctly concluded that the FAAAA preempts § 1555-C(3)(C).

We turn finally to whether the FAAAA preempts § 1555-D. In considering this question, we are mindful that courts should "not nullify more of a legislature's work than is necessary, for . . . a ruling of unconstitutionality frustrates the intent of the elected representative of the people." *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967, 163 L. Ed. 2d 812 (2006) (internal citation omitted). The first part of § 1555-D makes it

unlawful for any person knowingly to deliver to Maine consumers certain contraband tobacco products – *i.e.*, those tobacco products purchased by consumers from unlicensed retailers. The second part of § 1555-D charges a carrier with knowledge that a package contains tobacco products if the package is so marked or if the shipper appears on the Attorney General's list of unlicensed tobacco retailers.

Under Maine law, tobacco products purchased by a consumer from an unlicensed retailer are contraband. *See* 22 M.R.S.A. § 1555-C(7). The first part of § 1555-D is a corollary to § 1555-C(7) in that it makes the knowing delivery of contraband tobacco products illegal. Thus, the question we face is whether a generally applicable law barring any person from knowingly delivering contraband tobacco is preempted by the FAAAA insofar as the law pertains to carriers.

While the FAAAA's preemptive effect is broad, *see UPS I,* 318 F.3d at 335, it is not unlimited, *see Mendonca,* 152 F.3d at 1188. State laws that only have a "tenuous, remote, or peripheral" relation to services are beyond the FAAAA's reach. *Morales,* 504 U.S. at 390; *Mendonca,* 152 F.3d at 1188. In describing this limitation on preemption in the Airline Deregulation Act context, the Supreme Court explained that its broad interpretation of the statute's preemption provision did not place it "on a road that leads to pre-emption of gambling and prostitution as applied to airlines." *Morales,* 504 U.S. at 390. We understand the *Morales* Court to have meant that states may continue to enjoy the power to ban primary conduct, and that the ADA and FAAAA do not preempt laws applying these prohibitions to airlines and carriers.

Accordingly, *Morales* suggests that § 1555-D's ban on the knowing delivery of contraband tobacco products is not preempted by the FAAAA – even only insofar as it pertains to carrier services. Section 1555-D requires that carriers do not act as *knowing* accomplices in the illegal sale of tobacco products. It does not, however, require that carriers modify their delivery methods other than by declining to transport a product that Maine has legitimately banned. We think that this effect on services is "too tenuous" to warrant preemption. *Mendonca,* 152 F.3d at 1189 (stating that a state law is too tenuous to be preempted by the FAAAA where the law does not frustrate the FAAAA's deregulatory purposes).

If the rule were otherwise, states would be unable to bar a primary method by which contraband crosses state lines. We do not believe that this was Congress' intent in enacting the FAAAA. Other courts applying the FAAAA to prohibitions on the delivery of contraband tobacco have reached similar conclusions. *See Robertson v. Liquor Control Bd.,* 102 Wn. App. 848, 10 P.3d 1079, 1084-85 (Wash. App. Ct. 2000) (concluding that the FAAAA did not preempt a state law banning the transport of contraband cigarettes because otherwise "a motor carrier would be exempt from forfeiture for transporting a methamphetamine lab or poached game"); *see also N.Y. State Motor Truck Ass'n v. Pataki,* No. 03-CV-2386 (GBD), 2004 WL 2937803, at *6 (W.D.N.Y. Aug. 19, 2003) (concluding that the FAAAA did not preempt a state law making it unlawful for carriers to deliver cigarettes directly to New York consumers because "the mere fact that a statute concerns the transportation of a particular cargo by . . . carriers . . . does not render it . . . unconstitutional on preemption grounds"); *Ward v.*

New York, 291 F. Supp. 2d 188, 210-211 (S.D.N.Y. 2004) (similar).[13]

But, while Maine may ban a carrier from knowingly transporting contraband tobacco products, it may not dictate the procedures that a carrier should employ to locate these products in its delivery chain. *See UPS I*, 318 F.3d at 336 (concluding that the FAAAA preempted a Puerto Rico revenue-collection scheme that mandated procedures that carriers had to follow to deliver certain packages). The second part of § 1555-D violates this principle.

As noted, § 1555-D imposes upon a carrier constructive knowledge that it has delivered a tobacco product if the package containing the product is marked as containing tobacco or if the seller's name appears on the Attorney General's list. As UPS' experience demonstrates, a carrier seeking to comply with § 1555-D must specially inspect every package destined for delivery in Maine. Once the carrier has finished this inspection, it must segregate the

[13] There are many state laws barring the transport and delivery of contraband. *E.g.*, Ala. Code § 2-14-5 (barring transport of certain products related to bee keeping); Ariz. Rev. Stat. § 3-209 (barring the transport of quarantined produce); Ariz. Rev Stat. § 13-3102 (barring transport of prohibited weapons); Cal. Bus. & Prof. Code § 17533.9 (barring transport of tear gas); Cal. Fish & Game Code § 4800 (barring the transport of mountain lions); N.Y. Penal Law § 190.50 (barring transport of slot machines or other gambling devices). We have not a found a single case, outside the tobacco context, in which bans on the transport of contraband have been challenged as preempted by the FAAAA. *Cf.* Sir Arthur Conan Doyle, *Silver Blaze* (1890) (William S. Baring-Gould, ed., *The Annotated Sherlock Holmes*, Vol. II, 1967) (Detective Gregory: " 'Is there any other point to which you would wish to draw my attention?' Sherlock Holmes: 'To the curious incident of the dog in the night-time.' Gregory: 'The dog did nothing in the night-time.' Holmes: 'That was the curious incident.' ").

packages that contain tobacco and research whether the addressee is a Maine-licensed retailer or distributor who can receive the package. While the second part of § 1555-D does not expressly reference carrier services, it "impermissibly affect[s] . . . services . . . because it requir[es] UPS to identify the contents of the packages (a deviation from standard procedures used in deliveries elsewhere in the United States). . . ." *UPS II,* 385 F.2d at 14 (parenthesis in original). UPS can only provide timely package delivery if it follows uniform procedures that allow for "an orderly flow of packages." *UPS I,* 318 F.3d at 336. Because the second part of § 1555-D has the effect of forcing UPS to change its uniform package-processing procedures, the district court correctly found it to be preempted.[14]

In reaching this conclusion, we recognize that there is a potential tension between saying that, on the one hand, Maine is free to punish the knowing delivery of material that it has classified as contraband, while, on the other hand, ruling that it may not dictate or interfere with a carrier's delivery procedures. What we are saying here, however, is that Maine cannot use the mechanisms outlined in the statute to *impute* knowledge based on a failure to read labels or consult lists – an imputation which would amount to prescribing how carriers must operate.

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[14] The Attorney General argues that the associations have failed to establish a forbidden significant effect on UPS because they did not offer studies conducted by UPS on the cost of compliance. We agree with the district court that there is no such quantification requirement. The cases in this area have looked to the logical effect that a particular scheme has on the delivery of services or the setting of rates and have not required the presentation of empirical evidence. *See N.H. Motor Transp. Ass'n,* 377 F. Supp. 2d at 217 n. 92 (collecting cases).

If, however, Maine could prove that a carrier employee had actual knowledge that a package being delivered was contraband tobacco, then it might have a colorable enforcement case – although such circumstances, as a practical matter, may be difficult to prove. True, the "related to" language could stretch to such a case but it could also stretch to the knowing delivery of hard drugs – and Congress cannot have intended such a result.

III.

"[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant public health problem in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000). There is no question that Maine has sought to achieve a worthy objective by passing the Tobacco Delivery Law to combat this pernicious problem. *See N.H. Motor Transp. Ass'n,* 377 F. Supp. 2d at 219. But the FAAAA focuses on the effect that a state's law has on carriers, and not on the state's objective in passing the law. To the extent that Maine's Tobacco Delivery Law requires (or has the effect of requiring) carriers to implement state-mandated procedures in the processing and delivery of packages, it is preempted by the FAAAA. But to the extent that the Tobacco Delivery Law merely bars all persons (including carriers) from knowingly transporting contraband tobacco into Maine, the FAAAA is not implicated.

We **affirm** the judgment as it pertains to 22 M.R.S.A. § 1555-C(3)(C) and the second part of 22 M.R.S.A. § 1555-D but **reverse** the judgment as it pertains to the first part of § 1555-D. We **remand** the case to the district court with

instructions to amend the judgment consistent with this opinion. No costs are awarded.

So ordered.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL., PLAINTIFFS v. G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF MAINE, DEFENDANT

CIVIL No. 03-178-B-H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

377 F. Supp. 2d 197; 2005 U.S. Dist. LEXIS 10394

May 27, 2005, Decided

COUNSEL: For NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., VERMONT TRUCK AND BUS ASSOCIATION, INC., Plaintiffs; MICHAEL A. NELSON, Jensen, Baird, Gardner & Henry, Portland, ME; LAWRENCE R. KATZIN, PAUL T. FRIEDMAN, RUTH N. BORENSTEIN, Morrison & Foerester LLP, San Francisco, CA

For G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant; MELISSA REYNOLDS O'DEA, PAUL D. STERN, Office of the Main Attorney General, Augusta, ME.

JUDGES: D. BROCK HORNBY, UNITED STATES DISTRICT JUDGE.

OPINION BY: D. BROCK HORNBY

OPINION: DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The *Interstate Commerce Clause* gives Congress the authority "[t]o regulate commerce with foreign nations, and among the several States."[1] Congress has exercised this constitutional power to enact legislation that limits state authority over the transportation of goods by air and motor carriers. Does this federal legislation preempt a Maine statute that regulates carriers when they deliver tobacco products in Maine? Maine lawmakers had two worthy objectives in enacting the state statute: to reduce Maine teenagers' access to tobacco products and to collect tobacco taxes.[2] But worthy motives are not enough to avoid federal preemption, as other states learned when they tried to regulate consumer fraud or deceptive advertising in the airline industry.[3] I denied a preliminary request to enjoin enforcement of the Maine statute.[4] But now I conclude that two of the three challenged state provisions cannot survive the broad preemptive language of the federal legislation and two recent First Circuit decisions. If there is to be regulation in this area, it will have to come from the federal government.

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[1] U.S. Const. art. I, § 8, cl. 3.

[2] I have provided more detail on the reasons for the Maine legislation in *New Hampshire Motor Transport Ass'n v. Rowe* ("*N.H. Motor I*"), 301 F.Supp.2d 38, 44-45 n.12 (D.Me.2004).

[3] *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388-89, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992).

[4] *N.H. Motor I*, 301 F.Supp.2d at 46. Judge Daniels issued a similar decision in *New York State Motor Truck Ass'n v. Pataki*, 2004 WL 2937803, at *3-*6 (S.D.N.Y. Dec. 17, 2004).

I. PROCEDURAL BACKGROUND

New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association and the Vermont Truck & Bus Association ("the associations") are nonprofit trade associations. Their members include motor carriers and air/ground carriers in the cargo transportation business.[5] The associations sued the Maine Attorney General, seeking a declaration that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"),[6] preempts three provisions of Maine's law regulating the retail sale and delivery of tobacco ("the Maine Tobacco

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[5] *See* Statement of Undisputed Material Facts in Support of Pls.' "As Applied" Mot. for Summ. J. ("Pls.' SMF") ¶ 1 (Docket Item 61); Def.'s Resp. to Pls.' Statement of Undisputed Material Facts ("Def.'s Responsive SMF") ¶ 1 (Docket Item 69).

The associations ask me to take judicial notice of the following items as facts "not subject to reasonable dispute" under Federal Rule of Evidence 201: the affidavits filed in their earlier motion for summary judgment; the Maine Department of Health and Human Services' ("DHHS") proposed (now final) "Rules Related to the Retail Sale and Delivery of Tobacco Products in Maine"; and the public hearing and comment period for those rules. Req. for Judicial Notice in Support of Pls.' "As Applied" Mot. for Summ. J. (Docket Item 62). The Attorney General does not object to this motion. Def.'s Resp. to Pls.' Req. for Judicial Notice (Docket Item 67).

The associations cite the affidavits only in paragraph one of their Statement of Material Facts for the basic fact, admitted by the Attorney General, that the associations engage in the commercial delivery of property. I consider the affidavits only for this limited purpose. I am not sure that Rule 201 judicial notice is necessary for the state rules and the procedures for enacting them, but I do not need to decide the issue because there is no dispute about these rules and procedures.

[6] Pub.L. No. 103-305, 108 Stat. 1569 (codified in scattered sections of 49 U.S.C.).

Delivery Law").[7] They also ask that I permanently enjoin enforcement of these provisions.

I previously denied the associations' motion for summary judgment, and granted the Maine Attorney General's subsequent motion for partial summary judgment, rejecting the argument that the FAAAA facially preempts the Maine law.[8] Both parties now move again for summary judgment. The associations continue to argue facial preemption, and also bring an as-applied challenge based upon the Maine law's effects on one of their members, United Parcel Service ("UPS").[9] The Maine Attorney

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[7] 22 M.R.S.A §§ 1551 to 1560. The associations challenge 22 M.R.S.A. §§ 1555-C(3)(A), 1555-C(3)(C) and 1555-D.

[8] *N.H. Motor Transp. Ass'n v. Rowe* ("*N.H. Motor II*"), 324 F.Supp.2d 231, 234 (D.Me.2004); *N.H. Motor I*, 301 F.Supp.2d at 46.

[9] Pls.' "As Applied" Mot. for Summ. J. with Incorporated Memo. of Law (Docket Item 60). Commentators note some confusion over the distinction between as-applied and facial challenges. *See, e.g.*, Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L.Rev. 1321, 1335-41 (2000) (discussing the relationship between facial and as-applied challenges and stating that "[f]acial challenges are not sharply categorically distinct from as-applied challenges to the validity of statutes"); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum. L.Rev. 873, 879-83 (2005) (addressing the confusion about what constitutes a facial challenge and noting that it arises in part from the Supreme Court's statement in *U.S. v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987), that a facial challenge is only successful if the statute has no valid application); *see also McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2004) (indicating that the standard for a facial challenge may not be as demanding as *Salerno* suggests). On this motion and throughout this case, I use the term "facial" to refer to the challenge based solely on the words of the Maine statute and "as-applied" to refer to the challenge based solely on the actual effect of the law. *See N.H. Motor II*, 324 F.Supp.2d at 233-34 n.1; *N.H. Motor I*, 301 F.Supp.2d at 40 n. 2. This distinction is based on the associations' bifurcated summary judgment approach (first asserting a challenge based on the face of the statute, then bringing this effects-based challenge) and the

(Continued on following page)

General argues that the FAAAA does not preempt the challenged provisions either facially or as applied.[10]

II. LEGAL BACKGROUND

(A) Federal Regulation of the Transportation Industry

Federal regulation of the transportation industry dates back to the Interstate Commerce Act of 1887, which created the Interstate Commerce Commission ("ICC") to regulate interstate railroad carriers.[11] Congress sought national uniformity in the regulation of interstate rail transport. It therefore limited state authority over railroad carriers (and other industries later regulated by the ICC.)[12]

Congress placed motor carriers under ICC control with the Motor Carrier Act of 1935.[13] The Motor Carrier

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Supreme Court's holding in *Morales,* 504 U.S. at 388, 112 S. Ct. 2031, that the FAAAA preempts statutes that expressly refer to (based on the face of the statute) or have a forbidden significant effect on (based on the statute's application) a carrier's prices, routes or services.

[10] Def.'s Mot. for Summ. J. with Incorporated Memo. of Law (Docket Item 64); Def.'s Opp'n to Pls.' "As Applied" Mot. for Summ. J. ("Def.'s Opp'n") at 9 (Docket Item 68).

[11] *See* Act to Regulate Commerce (Interstate Commerce Act), ch. 104, 24 Stat. 379 (1887). For a comprehensive history of federal regulation of transportation, *see* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235 (2003).

[12] *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318, 325-26, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981); *see also W. Union Tel. Co. v. Boegli*, 251 U.S. 315, 316-17, 40 S. Ct. 167, 64 L.Ed. 281 (1920) (placing telegraph companies under ICC control showed congressional intent "to subject such companies to a uniform national rule" and thus preclude state regulation).

[13] Ch. 498, 49 Stat. 543 (1935).

Act authorized the ICC to regulate the entry, routes, business practices, rates and safety of motor carriers engaged in interstate or foreign commerce. A few years later, Congress created the Civil Aeronautics Authority, an agency similar to the ICC, to regulate air transportation.[14] The Civil Aeronautics Authority governed entry, routes, rates, business practices and safety of the airline industry. The Federal Aviation Act of 1958 recodified the Civil Aeronautics Act, continued the Civil Aeronautics Board (the reorganized form of the Civil Aeronautics Authority)[15] and established and transferred authority over safety regulation to the Federal Aviation Agency (later renamed the Federal Aviation Administration).[16]

Since the 1970s, Congress has reversed course and deregulated the transportation industry.[17] In the Airline Deregulation Act of 1978, Congress reduced federal regulation of the airline industry to encourage maximum reliance on free market competition.[18] Congress also prevented the States from interfering with federal deregulation by including a broad preemption provision prohibiting states from

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[14] *See* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938).

[15] *See* Reorganization Plan No. IV, § 7, 54 Stat. 1234, 1235-36 (1940).

[16] *See* Federal Aviation Act of 1958, Pub.L. No. 85-726, 72 Stat. 731 (1958); *see also* Department of Transportation Act, Pub.L. No. 89-670, §§ 3(e)(1), 6(c)(1), 80 Stat. 931, 932, 938 (1966) (renaming the Federal Aviation Agency).

[17] *See, e.g.*, ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803 (1995); Staggers Rail Act of 1980, Pub.L. No. 96-448, 94 Stat. 1895 (1980); Motor Carrier Act of 1980, Pub.L. No. 96-296, 94 Stat. 793 (1980); *see also* Dempsey, *supra*, at 327-66 (discussing deregulation of the various transportation industries).

[18] *See* Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered sections of 49 U.S.C.).

"enact[ing] or enforc[ing] any law . . . relating to rates, routes, or services of any air carrier."[19]

In the 1994 FAAAA, Congress extended the Airline Deregulation Act's preemption provision to prohibit state regulation of air/ground carriers as well. It also added a new provision preempting state regulation of motor carriers of property.[20] In the same language used in the Airline Deregulation Act's preemption provision, the FAAAA preemption provisions broadly prohibit states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service" of a motor carrier, air carrier or air/ground carrier of property.

In enacting the FAAAA preemption provisions, Congress exercised its authority under the Interstate Commerce Clause to ease the burden intrastate regulation imposed on interstate commerce.[21] Congress believed that the need for preemption of state authority arose out of a

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[19] *Id.* § 105(a); *see Morales*, 504 U.S. at 378-79, 112 S. Ct. 2031; *see also New England Legal Found. v. Mass. Port. Auth.*, 883 F.2d 157, 172-73 (1st Cir. 1989) ("In reducing federal economic regulation of the field [with the Airline Deregulation Act of 1978] . . . , Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation."). Congress initially codified this preemption provision at 49 U.S.C.App. § 1305(a)(1), then amended and recodified it at its current location, 49 U.S.C. § 41713(b)(1), in Pub.L. No. 103-272, ch. 417, 108 Stat. 745 (1994).

[20] *See* Federal Aviation Administration Authorization Act of 1994, Pub.L. No. 103-305. Section 601(b) of the FAAAA is the air/ground carrier provision, codified at 49 U.S.C. § 41713(b)(4)(A). Section 601(c) is the motor carrier provision, which was recodified as amended at its current location, 49 U.S.C. § 14501(c)(1), in Pub.L. No. 104-88, ch. 145, 109 Stat. 803 (1995).

[21] *See* FAAAA, Pub.L. No. 103-305, § 601(a) (findings).

"patchwork of [state] regulation" of transportation, which created "a huge problem for national and regional carriers attempting to conduct a standard way of doing business." It believed that intrastate regulation also resulted in higher rates for intrastate shipments. Congress designed the preemption provisions to eliminate diverse state regulations (such as regulation of entry, tariffs, prices and types of commodities carried), and promote uniform standards for air, air/ground and motor carriers engaged in the transportation of property.[22]

(B) Federal Contraband Cigarette Law

Although Congress has limited state regulation over the transportation of goods, Congress has also expressly recognized the power of the states to regulate and confiscate contraband cigarettes (cigarettes on which state taxes have not been paid). In 1978, Congress stated in the Contraband Cigarette Trafficking Act that federal regulation of contraband cigarettes does not "affect the concurrent jurisdiction of a State to enact and enforce cigarette tax laws, to provide for the confiscation of cigarettes and other property seized for violation of such laws, and to provide for penalties for the violation of such laws."[23] Congress included this provision because "[t]he major responsibility for enforcing state cigarette tax laws is now and must continue to be the burden of the states."[24]

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[22] H.R.Rep. No. 103-677, at 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60.

[23] 18 U.S.C. § 2345(a).

[24] H.R. Rep. 95-1778, at 13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5535, 5541.

(C) Maine's Tobacco Delivery Law

The Maine Legislature enacted the Tobacco Delivery Law to "clarif[y] the collection of taxes with regard to the delivery sales of cigarettes" and "to strengthen the regulation of delivery sales of cigarettes, especially with regards to preventing sales to minors."[25] When the Maine Legislature enacted the law in 2003, its Health and Human Services Committee considered testimony that nearly 25% of Maine's high school students smoke occasionally and 14% smoke on a regular basis.[26] The bill's sponsor informed the Health and Human Services Committee that delivery sales via the internet increased minors' access to tobacco by giving them an opportunity to purchase tobacco without having to verify their age. He also stated that out-of-state retailers advertise and sell tobacco products tax-free, thereby increasing the tobacco delivery sales through the mail and the internet and costing the State lost tax revenue.[27]

The Tobacco Delivery Law is one of many steps that Maine has taken to restrict underage access to tobacco. When considering the Tobacco Delivery Law, the Legislature heard testimony about Maine's "comprehensive program on youth smoking," which "includes education on

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[25] L.D. 1236, Summary for the Original Legislative Document (121st Me.Legis.2003).

[26] *See* Committee File of the Committee on Health and Human Services on L.D. 1236, "An Act To Regulate the Delivery Sales of Cigarettes and To Prevent the Sale of Cigarettes to Minors" (April 29, 2003), Testimony of the Maine Coalition on Smoking or Health. This testimony is the written testimony submitted at the time of the public hearing held by the committee assigned the bill. There is no record of the oral testimony presented at these hearings.

[27] *See id.*, Testimony of Representative Glenn Cummings.

tobacco, increases in the price of cigarettes through [an] excise tax, . . . programs to help youth who smoke and want to quit" and "tough laws regarding access."[28] According to repeated testimony, this comprehensive approach contributed to a decline in smoking by Maine high school students.[29]

Increasing internet sales have frustrated the State's laudable and extensive efforts to restrict underage access to tobacco. The Maine Tobacco Delivery Law addresses this problem by requiring: that delivery services check for packages marked as containing tobacco and confirm that those packages are being sent by a Maine-licensed tobacco distributor or retailer; that tobacco retailers tell their delivery service (such as UPS or the other members of the carrier associations) the age of any tobacco-product purchaser; and that tobacco retailers use for tobacco-product delivery only a delivery service that agrees to request age identification from and deliver to the specific addressee.[30]

(D) Other States' Tobacco Delivery Laws

Other states recently have passed statutes regulating the delivery of tobacco products.[31] Although these state

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[28] *Id.*, Testimony of the Maine Coalition on Smoking or Health.

[29] *See, e.g., id.; id.*, Testimony of Dora Anne Mills, Director, Bureau of Health, Department of Human Services ("As a result of these efforts, Maine's tobacco addiction rates have plummeted among youth – from nearly 40% of Maine high school students being . . . smokers in 1997 to 25% in 2001. This 36% decline is one of the largest declines seen across the country.").

[30] *See* 22 M.R.S.A. §§ 1555-C(3)(A), (C), 1555-D.

[31] *See, e.g.*, Ariz.Rev.Stat. §§ 42-3221 to 3230 (enacted in 2004); Conn. Gen.Stat. § 12-285c (enacted in 2003); Okla. Stat. tit. 68, § 317.4 (enacted in 2003); Wash Rev.Code § 70.155.105 (enacted in 2003). The

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tobacco delivery laws involve similar limitations on tobacco shipments, the specific requirements vary by state.

For example, while state limitations on tobacco shipments often depend on whether a retailer shipping or receiving the package is licensed, the licensing is state-specific. Thus, for each tobacco shipment, an interstate delivery service must determine whether the addressee is located in a state that has such a limitation, then consult a list of licensed retailers provided by that state to determine if the delivery is lawful.[32]

Many states require that tobacco retailers use a delivery service that will confirm the addressee's age and deliver only to an adult.[33] But while some states require that the addressee sign personally for the package, others allow any adult to sign. States also vary in their requirements for checking the identification of the person signing for the package.[34]

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associations cite many of these statutes in paragraphs 100 to 158 of their Statement of Material Facts. The Attorney General qualifies and moves to strike all of these paragraphs. Def.'s Responsive SMF ¶¶ 100-158. I consider these state statutes as relevant law, not facts.

[32] *See, e.g.*, Alaska Stat. § 43.50.105(c); Conn. Gen.Stat. § 12-285c(a); 22 M.R.S.A. § 1555-D; N.Y. Pub. Health Law §§ 1399-*ll* (1)-(2).

[33] *See, e.g.*, Ariz.Rev.Stat. § 42-3225(A)(2); Conn. Gen.Stat. § 12-285c(c); Del Code Ann. tit. 30, § 5365(a)(2); 22 M.R.S.A. § 1555-C(3)(C); Or.Rev.Stat. § 323.718(1)(b)(A).

[34] *Compare* Ariz.Rev.Stat. § 42-3225(2) (addressee or adult residing at the same address must sign and identification is required if the signer appears to be under twenty-seven) *with* Conn. Gen.Stat. § 12-285c(c) (customer receiving the delivery must provide proof of age) *and* 22 M.R.S.A. §§ 1555-C(3)(C)(2) to (3) (addressee must sign and identification is required if the addressee is under twenty-seven).

Although many of these state laws require the retailer to mark the package to reveal that it contains tobacco, the required location and content of the marking may differ.[35] The type of tobacco regulated also varies from state to state. Some statutes regulate only cigarettes, while others cover a broad range of tobacco products.[36]

III. ANALYSIS

The carrier associations attack Maine's Tobacco Delivery Law on the basis that the FAAAA expressly preempts state regulation that relates to a carrier's services.[37] According to Article VI of the United States Constitution, federal statutes enacted under constitutional authority are "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The FAAAA, enacted under Congress's constitutional authority to regulate interstate

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[35] *Compare* Del Code Ann. tit. 30, § 5365(a)(1) (shipping documents must include a clear and conspicuous statement that Delaware law prohibits shipping tobacco to minors and requires the payment of applicable taxes) *with* 22 M.R.S.A. § 1555-C(3)(B); 10-144 Code Me. R. Ch. 203, §§ 10(C)(2) (marking must be on the outside of the package and, at a minimum, on the same plane as the shipping label, and must show that tobacco products are inside and list the retailer's name and Maine license number) *and* Nev.Rev.Stat. § 202.24935(3) (packaging or wrapping must be clearly marked "cigarettes" or "tobacco products").

[36] *Compare* Alaska Stat. § 43.50.105 (cigarettes) *and* Conn. Gen.Stat. § 12-285c (cigarettes) with 22 M.R.S.A. §§ 1551(3), 1555-C, 1555-D (any form of tobacco and any material or device used for smoking, chewing or other tobacco consumption) and Nev.Rev.Stat. § 202.24935(1) ("cigarettes, cigarette paper, tobacco of any description or products made from tobacco").

[37] They also argue preemption based on prices and routes, but I find it necessary to address only service(s). Since the associations have argued only express preemption, I do not consider implied preemption.

commerce, prohibits states from enacting laws "related to a . . . service of" an air carrier, air/ground carrier or motor carrier "with respect to the transportation of property."[38] Congress has specified some areas that are exempt from preemption, but the Maine Tobacco Delivery Law fits none of the exemptions.[39] Therefore, the associations argue, the

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[38] *See* 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). 49 U.S.C. § 14501(c)(1) is the motor carrier provision. It provides that a state:

> may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any *motor carrier* (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(Emphasis added.). 49 U.S.C. § 41713(b)(4)(A) is the air and air/ground carrier provision. In very similar language, it provides that a state

> may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service *of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership* when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(Emphasis added). Congress intended that these "identical" provisions "function in the exact same manner with respect to [their] preemptive effects." H.R.Rep. No. 103-677, at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757. Both provisions apply here because the associations include ground carriers as well as air/ground carriers. (UPS is covered by the air/ground carrier provision because one of its operating entities is an air carrier. Pls.' SMF, Def.'s Responsive SMF ¶ 5.)

[39] Savings clauses in the preemption provisions permit states to regulate safety with respect to motor vehicles, highway route controls or limitations based on vehicle size, weight or cargo hazards, financial responsibility relating to insurance, household goods transportation, and tow truck pricing for service provided without the towed-vehicle owner's or operator's consent. 49 U.S.C. §§ 14501(c)(2), 41713(b)(4)(B).

The safety exception, 49 U.S.C. §§ 14501(c)(2)(A), 41713(b)(4)(B)(i), does not exempt Maine's Tobacco Delivery Law from preemption because the exception applies only to state regulation of motor vehicle

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FAAAA preempts the challenged provisions of the Maine Tobacco Delivery Law.

Congress enlarged the Airline Deregulation Act preemption provisions to include motor carriers and air/ground carriers because it wanted to level the playing field between deregulated air carriers, carriers that are affiliated with an air carrier but not otherwise covered by the Airline Deregulation Act, and motor carriers not affiliated with an air carrier. *Id.* at 82, 87, *reprinted in* 1994 U.S.C.C.A.N. at 1754, 1759. The preemption is not limited to interstate transportation. *See* FAAAA, Pub.L. No. 103-305, § 601(a) (finding that "the regulation of *intrastate transportation* of property by the States has – (A) imposed an unreasonable burden on interstate commerce; (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and (C) placed an unreasonable cost on the American consumers") (emphasis added); *N.Y. State Motor Truck Ass'n,* 2004 WL 2937803, at *4 ("The FAAAA, with a few minor exceptions, effectively preempts state regulations of intrastate motor carrier activities.").

Given the deadly health consequences, there are no persuasive arguments for allowing minors to have tobacco products. Thus, it is hard to believe that, if Congress were confronted now with the specific question whether Maine should be able to take steps to protect the health of its

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safety, and does not preserve the states' general authority over safety issues. *See United Parcel Serv., Inc. v. Flores-Galarza* ("*UPS II*"), 385 F.3d 9, 13-14 (1st Cir.2004). The exception for the transportation of household goods, 49 U.S.C. §§ 14501(c)(2)(B), 41713(b)(4)(B)(ii), also does not apply because it refers to state regulation of the services of moving companies. *See UPS II,* 385 F.3d at 14.

children, Congress would vote to prohibit what Maine is trying to do. But the federal legislation that I must interpret comes from a congressional push to deregulate airlines and motor carriers generally, without regard for the topic or goal of the preempted state regulation (other than the few, irrelevant, specified exceptions). At the time, Congress believed that state regulation was interfering with ordinary market forces, driving up the price of service and hindering competition.[40] To avoid that state interference, Congress enacted preemption legislation that speaks in general categories. To interpret the scope of the resulting federal preemption, I must "look to Congress's intent, which is revealed in the language of the provision, as well as the structure and purpose of the statute."[41]

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[40] *See* FAAAA, Pub.L. No. 103-305, § 601(a).

[41] *United Parcel Serv., Inc. v. Flores-Galarza* (*"UPS I"*), 318 F.3d 323, 334 (1st Cir.2003). The Supreme Court has provided several guideposts for approaching the issue of federal preemption:

> (1) An express congressional definition of what is preempted "supports a reasonable inference ... that Congress did not intend to pre-empt other matters." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995);
>
> (2) Congressional purpose is the "ultimate touchstone." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (internal quotation omitted);
>
> (3) If the federal statute would "bar state action in a field of traditional state regulation," a court must "work on the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001) (citations and internal quotation omitted);

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(4) This "assumption" (elsewhere called a "presumption," *see Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666, 123 S. Ct. 1855, 155 L. Ed. 2d 889 (2003); *UPS I*, 318 F.3d at 336) disappears when a state legislates in a field with "a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000).

Ultimately the analysis here hinges on the second factor, congressional purpose.

The parties have not argued that the first factor helps resolve this case.

They have spent a good deal of energy on the third and fourth factors. I conclude that I erred in my analysis in my earlier decision on the associations' facial motion for summary judgment, where I applied the presumption against preemption by viewing the field narrowly as "ground transport or delivery of dangerous products, especially to minors in order to protect their health." I noted there that the First Circuit in *UPS I* made much of the long federal presence in air transportation (which I distinguished from the history in ground transportation). *See N.H. Motor I*, 301 F.Supp.2d at 44. But I observe now that I cannot make this distinction, because the purpose of the FAAAA's preemption provisions was to even the playing field for air and ground transportation. *See* H.R.Rep. No. 103-677, at 82, *reprinted in* 1994 U.S.C.C.A.N. at 1754. More importantly, in determining whether there is a presumption against federal preemption, the focus is to be on the field where *Congress* legislates. ("Th[e] presumption [against preemption] only arises . . . if Congress legislates in a field traditionally occupied by the states." *UPS I*, 318 F.3d at 336 (citing *Locke*, 529 U.S. at 108, 120 S. Ct. 1135).) I therefore adopt the approach taken in *UPS I* and do not apply the presumption against preemption. *But see Ward v. New York*, 291 F.Supp.2d 188, 209-10 (W.D.N.Y.2003) (distinguishing *UPS I* and applying a presumption against preemption because New York's tobacco delivery law was "a public health law of general application").

Since both sides argued explicitly on this motion whether I should apply the presumption against preemption, there is no unfairness in my making this correction and no longer applying the presumption. *See* Pls.' "As Applied" Mot. for Summ. J. at 10-13; Def.'s Opp'n at 9-12; Def.'s Mot. for Summ. J. at 8. Even if I continued to apply the presumption, I would find Maine's Tobacco Delivery Law preempted for the reasons stated in text.

I turn therefore to the statutory language. The preemption provisions broadly prohibit states from enacting a law "related to a price, route, or service" of an air carrier, air/ground carrier or motor carrier "with respect to the transportation of property."[42] I deal with the significant terms in reverse order.

(A) "With respect to the transportation of property"

The Maine statute deals with the transportation (here, the delivery) of property, namely, tobacco products.[43]

(B) "Service"

Two Supreme Court cases have interpreted the Airline Deregulation Act's preemption provision (the statutory predecessor to the FAAAA preemption provisions). The Airline Deregulation Act provision that these cases interpret is very similar to both of the FAAAA preemption provisions and uses the term "services."[44] Unfortunately,

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[42] 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A).

[43] The language "with respect to the transportation of property" comes from the motor carrier provision, 49 U.S.C. § 14501(c)(1). The provision for air carriers and air/ground carriers, 49 U.S.C. § 41713(b)(4)(A), has slightly different language. This provision prohibits state regulation of "an air carrier or carrier affiliated with a direct air carrier . . . *when such carrier is transporting property by aircraft or motor vehicle* (whether or not such property has had or will have a prior or subsequent air movement)." (Emphasis added). Under this provision, the Maine statute regulates a motor carrier affiliated with a direct air carrier when the motor carrier is transporting (delivering) property (tobacco products) by motor vehicle.

[44] These cases interpret the original Airline Deregulation Act provision, which provided that no state "shall enact or enforce any law,

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these Supreme Court cases do not shed much light on the term "services" or "service." In one case, the state statutes regulated the advertising of airfares. Since the federal statute expressly prohibited state regulation that relates to rates (fares), the Supreme Court had no need to consider or define the term "services."[45] The other case concerned frequent flyer miles; the Supreme Court observed summarily that frequent flyer miles relate both "to 'rates,' *i.e.*, [the airline]'s charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades." It did not elaborate further on the meaning of the term "services," although it did reject an attempt to separate "matters 'essential' from matters unessential to airline operations" in analyzing what is preempted.[46]

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rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act . . . to provide air transportation." 49 U.S.C.App. § 1305(a)(1) (1993). In 1994, Congress amended this preemption provision to include its current language (the same language used in the FAAAA provisions), which provides that a state may not "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." *See* Pub.L. No. 103-272, ch. 417, 108 Stat. 745 (July 5, 1994) (also recodifying the provision at its current location, 49 U.S.C. § 41713(b)(1)). Congress did not intend the amendment to make any substantive change, *see id.; Wolens*, 513 U.S. at 223 n.1, 115 S. Ct. 817, and the parties have not cited any cases suggesting a different definition for the term "service" under the FAAAA than that used for the term "services" under the original Airline Deregulation Act provision.

[45] *Morales*, 504 U.S. at 379-80, 112 S. Ct. 2031. The Court in *Morales* instead addressed the meaning of the phrase "relating to," as discussed below. 504 U.S. at 383-91, 112 S. Ct. 2031.

[46] *Wolens*, 513 U.S. at 226, 115 S. Ct. 817. *Wolens* considered the meaning of the language "enact or enforce any law" as it related to the common law of contracts. *See id.* at 228-29, 115 S. Ct. 817.

Lower courts, on the other hand, have struggled with the scope of the "services" preemption in the Airline Deregulation Act, particularly in determining whether federal law preempts state tort law for accidents that happen on board an aircraft.[47] These courts have limited the preempting term "service" to the frequency and scheduling of transportation and the choice of starting and ending points;[48] or have defined "services" as bargained-for

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[47] In *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265-66 (9th Cir. 1998), the Ninth Circuit held that the Airline Deregulation Act did not preempt state negligence and breach of contract claims because "service" referred to "the provision of air transportation to and from various markets at various times," not the provision of amenities such as personal assistance, luggage handling, and food and drink. The Eleventh Circuit has held that a state claim of age discrimination in employment is not preempted because it does not relate to an airline's services, but that claims relating to the physical capabilities of flight personnel could relate to services and thus be preempted. *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1466-68 (11th Cir. 1998). Courts have also held that a state defamation claim had too tenuous a connection with services (ticketing) to be preempted, *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 195 (3d Cir. 1998), but that a plaintiff's claim for conversion for a carrier's failure to deliver the contents of a package related to the carrier's services and was thus preempted, *Forman v. Fed. Express Corp.*, 194 Misc.2d 441, 753 N.Y.S.2d 348, 351-52 (2003). The Fifth Circuit held that a state tort claim for personal injury was not preempted because it related to the operation of the aircraft, not its services. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340 (5th Cir. 1995). The court in *Trujillo v. American Airlines, Inc.*, 938 F.Supp. 392, 394 (N.D. Tex. 1995), applied this services/operations distinction, holding that negligence and consumer protection claims for the airline's preparation and shipping of a package were preempted because they involved services, not operations of the airline.

Some of these cases interpret the term "services" in the original Airline Deregulation Act preemption provision, 49 U.S.C.App. § 1305(a)(1), and others interpret the term "service" in the amended provision, 49 U.S.C. § 41713(b)(1), depending on which version was in effect.

[48] *Charas*, 160 F.3d at 1265-66.

provisions (preempted) distinct from "operations or maintenance" (not preempted).[49] The Third Circuit, on the other hand, has concluded that the services/operations distinction is "strained and unsatisfactory," and that to define the term service, "focusing on the competitive forces of the market . . . leads to a more accurate assessment of Congressional intent."[50]

The First Circuit has not entered this debate over the meaning of the word "services" in the Airline Deregulation Act.[51] But without discussing the ambiguities of the term, the First Circuit has said that the word "service," as used in the FAAAA's air and air/ground carrier provision, includes "the delivery of packages on an express or time-guaranteed basis."[52] In that case, the First Circuit characterized UPS's delivery services as depending on the "orderly flow of packages." It also quoted approvingly a Ninth Circuit statement that "[t]erms of service determine cost. To regulate them is to affect the price."[53]

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[49] *Hodges*, 44 F.3d at 336-37, 338-39.

[50] *Taj Mahal*, 164 F.3d at 194.

[51] *See French v. Pan Am Express, Inc.*, 869 F.2d 1, 3 (1st Cir.1989) (declining to address express preemption based on the Airline Deregulation Act's reference to "services" where the comprehensive federal legal scheme set out in the rest of the Airline Deregulation Act impliedly preempted the plaintiff's state claim).

[52] *UPS I*, 318 F.3d at 336 (interpreting 49 U.S.C. § 41713(b)(4)(A)).

[53] *Id.* (quoting *Fed. Express Corp. v. Cal. Pub. Utils. Comm'n*, 936 F.2d 1075, 1078 (9th Cir. 1991)). Price is another preempted area of regulation. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (prohibiting states from enacting or enforcing a law "related to a price, route, or service" of a carrier). The Fifth Circuit has interpreted the term "price," holding that a negligence claim for failure to provide more leg room to prevent the health condition of deep vein thrombosis related to price because providing more leg room would reduce the number of seats and affect

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I follow the First Circuit decision. The Maine statute here deals with the delivery of packages and, in its application to UPS, affects delivery on an express or time-guaranteed basis. UPS has a national and international distribution system that relies heavily on uniform procedures for picking up, documenting, processing, handling and delivering packages. The record establishes that to comply with the Maine statute, UPS must use delivery practices for Maine packages that vary from its nationally and internationally uniform procedures.[54] This lack of uniformity affects the price of UPS's services and interferes with the orderly flow of packages by jeopardizing the

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the prices the airline charged. *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 383 (5th Cir. 2004).

[54] Pls.' SMF, Def.'s Responsive SMF ¶¶ 7, 9, 18, 20, 24, 26, 30-31, 60-67. The Attorney General admitted paragraphs 7, 9, 18, 26, 30, 31 and 60 through 67 of the associations' Statement of Material Facts.

He responded "qualified" to the associations' paragraph 20, which states that UPS preloaders must scan the exterior of every package to be delivered in Maine for a marking indicating the package contains tobacco products. The Attorney General responded that "[p]reloaders are already inspecting packages for markings," but did not deny that it takes the preloaders *more time* to check the package for the marking required by the Maine statute, *see* 10-144 Code Me. R. Ch. 203, §§ 10(C)(2), 11; *see also* footnote 67 (discussing what a carrier must do to comply with these regulations).

In response to paragraph 24, which states that the preloaders do not usually read the shipper's name and only occasionally read the addressee's name, and that having to do so because of the Maine statute delays the preloaders' tasks, the Attorney General stated, "Qualified. UPS has done no operational study to ascertain whether there is such a delay or, if so, the magnitude of that delay." The Attorney General does not deny that the preloaders usually do not check for the shipper's or the addressee's name, or that having to do so causes delay. There is no need for an operational study because it is logical that checking these names would cause some delay, however slight.

speed, reliability and efficiency of delivery.[55] Under First Circuit precedent, therefore, the Maine statute has some effect on a carrier's "services."

(C) "Related to"

In *Morales,* the Supreme Court determined the meaning of the phrase "relating to" in the Airline Deregulation Act.[56] The Court recognized that the phrase has a broad scope both in ordinary language and in the statute. It ruled that the relationship can be satisfied in either of two ways: if the state law: (a) expressly references the carrier's prices, routes or services or (b) has a "forbidden significant effect upon" the carrier's prices, routes or services.[57] I see no reason to interpret the FAAAA phrase, "related to," any differently. Indeed, the legislative history makes clear that the drafters intended the same meaning,[58] and the First Circuit has made it the law of this

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[55] *See* Pls.' SMF, Def.'s Responsive SMF ¶¶ 7-8, 10-11. The Attorney General admitted paragraphs 7, 8 and 10, but responded "qualified" to the associations' paragraph 11. Paragraph 11 states that UPS must avoid even minor delays to meet its delivery deadlines, and that "delays or disruptions at any point in UPS's operations can affect thousands of packages in transit." The Attorney General responded that UPS's time projections are based on historical data, which inherently include delays associated with non-deliverable packages, and that a number of factors can delay UPS's services. But the Attorney General did not deny that delays affect delivery deadlines, and, logically, the fact that UPS already encounters delays does not mean additional delay is acceptable.

[56] 504 U.S. at 383-89, 112 S. Ct. 2031.

[57] *Id.* at 388, 112 S. Ct. 2031; *see also UPS I*, 318 F.3d at 335 (citing *Morales*, 504 U.S. at 388, 112 S. Ct. 2031).

[58] According to the FAAAA's legislative history:

> In substituting the word "related" for the prior word "relating" . . . we are intending no substantive change to the previously enacted preemption provision in Section 105 of the

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circuit that the *Morales* interpretation controls the FAAAA as well.[59] I will address each of the three challenged Maine provisions for whether they satisfy either or both or these two requirements.

> Federal Aviation Act and do not intend to impair the applicability of prior judicial case law interpreting these provisions. In particular, the conferees do not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales v. Trans World Airlines, Inc.* . . .

H.R.Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755.

[59] *UPS I*, 318 F.3d at 334-35. In interpreting the Airline Deregulation Act preemption provision, the Court in *Morales* considered a similar ERISA preemption provision, 29 U.S.C. § 1144(a). 504 U.S. at 383-85, 112 S. Ct. 2031. The ERISA provision preempts state laws "insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a); *Morales*, 504 U.S. at 383, 112 S. Ct. 2031. At the time of *Morales*, under the ERISA provision a law "relate[d] to" an employee benefit plan "if it had a connection with, or reference to, such a plan." *Morales*, 504 U.S. at 384, 112 S. Ct. 2031 (internal quotation omitted). The Supreme Court later limited the meaning of "relate to" in the ERISA provision, stating that courts should consider the objectives of the ERISA statute rather than look to "infinite relations" or "infinite connections" to measure preemption, and noting that ERISA preempts state laws that "mandate[] employee benefit structures or their administration." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-58, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995); *see also Catholic Charities of Me., Inc. v. City of Portland*, 304 F.Supp.2d 77, 90-92 (D.Me.2004) (discussing this cutback in the ERISA meaning of "relate to"). Despite the Supreme Court's narrowing of the ERISA meaning of "relate to," Congress intended the *Morales* Court's broad interpretation of "relating to" in the Airline Deregulation Act to apply to the FAAAA preemption provisions. *See* H.R.Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755; *see also UPS I*, 318 F.3d at 335 n.19 ("[I]f developments in pension law have undercut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustment. Our marching orders are clear: follow decisions until the Supreme Court overrules them.") (quoting *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 608 (7th Cir. 2000)) (alteration in original).

(1) Section 1555-D

One of the three challenged provisions of the Maine statute expressly references carriers' services. Specifically, section 1555-D states: "A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State."[60] Although this prohibition uses the general language "a person" (rather than "a delivery service" or "a carrier"), it expressly references the service that carriers provide (the transportation of property). Carriers that violate this prohibition face penalties under section 1555-D(2). Moreover, to achieve compliance, subsection 1555-D(1) requires the Attorney General to provide lists of licensed tobacco retailers and known unlicensed retailers to "a delivery service." "Delivery service" is defined as "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages, or other containers."[61] A "delivery service" under the Maine statute that uses motor vehicle transportation fits within the

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[60] In full, the preamble reads:

> A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer. A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of section 1555-C, subsection 3, paragraph B or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section.

22 M.R.S.A. § 1555-D.

[61] *Id.* § 1551(1-C).

FAAAA's definition of "motor carrier" ("a person providing motor vehicle transportation for compensation").[62] Section 1555-D thus expressly references carriers' services. Under the analysis of *Morales* and *UPS I*, that is enough to result in preemption.

This conclusion differs from what I said in my preliminary rulings.[63] My conclusion has changed because I no longer apply the presumption against preemption,[64] and because, since my previous rulings, I have had the opportunity for further thought and reflection, as well as the benefit of the First Circuit's decision in *UPS II*, which sheds additional light on the issue of preemption under the FAAAA. I follow the plain language of the statute and the First Circuit authority in *UPS I* and *UPS II* in concluding that section 1555-D expressly references carriers' services.[65]

Even if it did not make the express reference, section 1555-D would be preempted because, under the other *Morales/UPS I* standard for preemption, it also has a forbidden significant effect on carriers' services. Section 1555-D prohibits carriers from delivering tobacco products

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[62] 49 U.S.C. § 13102(12). The FAAAA does not define the term "carrier," used in the air/ground provision, 49 U.S.C. § 41713(b)(4)(A) (preempting state regulation of "any air carrier or carrier affiliated with a direct air carrier").

[63] *N.H. Motor II*, 324 F.Supp.2d at 234; *N.H. Motor I*, 301 F.Supp.2d at 43-46.

[64] *See* footnote 41.

[65] There is no unfairness to the parties in altering my conclusion since both parties argued the matter on these new motions. *See* Pls.' "As Applied" Mot. for Summ. J. at 22-23; Def.'s Opp'n at 9 (arguments on facial preemption); footnote 41 (citing the parties' arguments on these motions on the presumption against preemption).

in Maine if they have been purchased from an unlicensed retailer, unless the delivery is to a licensed tobacco distributor or retailer. The carrier must thus consult the Maine Attorney General's lists of Maine-licensed and known unlicensed tobacco retailers before delivering packages containing tobacco products.[66]

For a carrier to comply with section 1555-D, it (in the case of UPS, its preloaders who load the package cars for deliveries) must examine every package it receives with a Maine destination address to try to determine if the package contains tobacco products. It can do this either by looking for the required marking,[67] or by reading the names of the addressee and the shipper for some indication that the package contains tobacco products.[68] If the package is marked or if the name of the addressee or shipper indicates tobacco products, the carrier must next research whether the addressee is a tobacco retailer or

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[66] *See* 22 M.R.S.A. § 1555-D(1). (The carrier is presumed to know that a package contains a tobacco product if it is from a listed unlicensed retailer or if it is marked by the retailer, as required in section 1555-C(3)(B), with the name and Maine license number of the retailer and an indication that the contents are tobacco products. *Id.* § 1555-D.)

[67] The regulations for the Maine Tobacco Delivery Law attempt to ease examination by requiring that the marking "shall, at a minimum, appear on the same plane of the package as the shipping label that identifies the delivery address." *See* 10-144 Code Me. R. Ch. 203, §§ 10(C)(2). A carrier "is deemed to know that a package contains a tobacco product" if it is marked in this way. *Id.* § 11. But the carrier is protected, *i.e.*, "deemed *not to know* that a package contains tobacco," only if the marking appears only on the plane opposite the shipping label (the bottom of the package). *Id.* This means that a carrier will be presumed to know the package's contents if the marking is on the top of the box, and may be found to know the contents if the marking appears on any side other than the top or the bottom.

[68] Pls.' SMF, Def.'s Responsive SMF ¶¶ 18, 20, 23, 33, 94-96.

distributor licensed in Maine (and thus able to receive any package containing tobacco products, whether shipped from a licensed or unlicensed retailer). For UPS, this results in the package being removed from the usual delivery procedures.[69] If the addressee is not a licensed tobacco retailer or distributor, UPS arranges to have the package returned to the shipper. If the shipper is located in Maine, UPS must contact the shipper to retrieve the package (because returning it to the shipper would itself violate section 1555-D).[70]

In *UPS II*, the First Circuit held that a Puerto Rico statute "impermissibly affected UPS's prices, routes, and services in part because it required UPS to identify the contents of the packages (a deviation from standard procedures used for deliveries elsewhere in the United States)."[71] Section 1555-D of the Maine statute requires carriers to attempt to identify a package's contents, causing UPS to use procedures for packages in Maine that differ from its nationally uniform procedures. This departure from UPS's uniform procedures delays the delivery process.[72] Having to identify, separate and, if necessary,

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[69] *See* Pls.' SMF, Def.'s Responsive SMF ¶ 26.

[70] Pls.' SMF, Def.'s Responsive SMF ¶¶ 30-31.

[71] 385 F.3d at 14.

[72] Pls.' SMF, Def.'s Responsive SMF ¶¶ 20, 24, 26. The Attorney General often qualifies or denies the associations' statements that the changed procedures cause delay, claiming that the associations have not done any operational or time study to prove the delay. *See, e.g.*, Def.'s Responsive SMF ¶ 24, 29. I conclude that there is no need for empirical studies to prove that a change in the normal, uniform procedure, such as removing the package from the delivery process to research the addressee, Pls.' SMF ¶¶ 26-29, would cause a delay in the process. The First Circuit did not require such data to prove an impact on the

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contact the shipper to retrieve a package containing tobacco products is at least as burdensome as the impermissible requirement in *UPS I* that UPS obtain a certificate of excise tax payment from the recipient of a parcel.[73]

The summary judgment record therefore shows that, as in *UPS I*, compliance with section 1555-D significantly affects UPS's services by interrupting the orderly flow of packages and interfering with the timeliness and effectiveness of UPS's service.[74] I cannot successfully distinguish the effects of section 1555-D from the effects of the Puerto Rico statute in *UPS I* and *UPS II*.[75] It is true that

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express or on-time delivery of packages in *UPS I*, 318 F.3d at 334-36. *See also* footnote 92 (addressing the need for empirical data).

[73] *See* 318 F.3d at 326, 327 n.3.

[74] *See id.* at 336; *accord Wine & Spirits Wholesalers of Mass., Inc. v. Net Contents, Inc.*, 10 F.Supp.2d 84, 87 (D.Mass.1998) (tort claim based on Federal Express's alleged violation of statutory licensing provisions for liquor transporters dealt with the act of and method employed in providing delivery services for wine and was thus preempted by the Airline Deregulation Act).

[75] The Attorney General argues that the economic nature of the tax regulation in *UPS I* distinguishes it from this case because Congress intended to preempt economic regulation, not regulation of health and safety. Def.'s Mot. at 9-10, 16; Def.'s Opp'n at 11-12. The FAAAA's legislative history does refer to "economic regulation," but does not define the term (and the Attorney General does not suggest a definition). *See* H.R.Rep. No. 103-677, at 82, *reprinted in* 1994 U.S.C.C.A.N. at 1754 (noting that one purpose of the preemption provisions is to even the playing field between air carriers and motor carriers "with respect to intrastate economic trucking regulation"); *id.* at 84 (states may not use their permissible regulatory authority "as a guise for continued economic regulation as it relates to prices, routes or services"); *id.* at 87 (citing the Ninth Circuit's holding in *Fed. Express*, 936 F.2d at 1079, that the Airline Deregulation Act preempted "intrastate economic regulations for motor carriers" as applied to Federal Express). In interpreting the Airline Deregulation Act preemption provision in *Federal Express*, the Ninth Circuit concluded that the term "economic

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the purpose of the Puerto Rico requirement was to ensure excise tax collection, whereas the purpose of this Maine provision is minors' health.[76] But a worthy purpose does not save a state statute from federal preemption.[77]

According to the First Circuit, courts should derive Congress's intent not only from the words of the statute but also from the statute's structure and purpose.[78] Here, the congressional purpose is apparent in the language of

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regulations" includes regulations that bear on price *and* regulations that relate to a carrier's terms of service because, as the First Circuit quoted in *UPS I*, "[t]erms of service determine cost. To regulate them is to affect the price. The terms of service are as much protected from state intrusion as are the air carrier's rates." 936 F.2d at 1078 (quoted in *UPS I*, 318 F.3d at 336). Under this definition, which I look to because it was cited with approval by the First Circuit and is consistent with the language and purposes of the FAAAA, the Maine regulations are economic because they affect the carriers' terms of service and, accordingly, affect the price of the carriers' services. There is therefore no basis for an economic/non-economic distinction between the Puerto Rico law in *UPS I* and the Maine regulations.

[76] As I observed at the outset, the Maine statute as a whole has a dual purpose: tax collection and protection of minors' health. The particular challenged provisions, however, achieve only the health purpose and have no apparent relationship to tax collection. Def.'s Reply Br. at 4 (noting that although one purpose of the statute is tax collection, the challenged provisions relate only to the statutory purpose of restricting minors' access to tobacco).

[77] *See, e.g., Witty*, 366 F.3d at 386 (concluding that the Airline Deregulation Act preempted a tort lawsuit alleging that the airline was negligent in creating a risk of deep vein thrombosis, a health condition with potentially serious complications).

[78] *UPS I*, 318 F.3d at 334. Perhaps that analysis is for implied preemption, not argued here. *See Morales*, 504 U.S. at 383, 112 S. Ct. 2031 ("pre-emption may be either express or implied, and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose") (internal quotation omitted). I consider it, however, in light of the First Circuit's pronouncement in *UPS I*.

the FAAAA preemption provisions, Congress's view of the problem it was dealing with, and the legislative history: Congress wanted to avoid the burden on interstate commerce caused by diverse state regulations.[79] The structure of the preemption provisions reflects this congressional intent, for the provisions enlarge the Airline Deregulation Act's already broad preemption scheme.[80] Indeed, as other individual states promulgate restrictions that vary a little or a lot from what Maine has done,[81] the growing complexity

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[79] *See* Pub.L. No. 103-305, § 601(a) (findings); H.R.Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759.

[80] *See* FAAAA, Pub.L. No. 103-305, § 601(b), (c). Other than the preemption provisions, the structure and content of the FAAAA are not helpful in determining Congress's intent. Some provisions advance goals similar to those of the preemption provisions, by limiting the burdens on interstate commerce caused by the taxation of airport businesses, *see id.*, § 112(e), and promoting the efficiency of air transportation, *see id.* § 104 (administration of airport improvement programs should employ technology and approaches that will promote efficiency in air transportation). But most of the statute authorizes various research programs, reports, fees and appropriations unrelated to the preemption of state regulation or the general goal of deregulation. The structure of the statute is useful to consider but not as significant as it would be if the parties were arguing implied, rather than express, preemption. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996) (if "explicit pre-emption language does not appear [in the statute], or does not directly answer the question . . . courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent"); *Morales*, 504 U.S. at 383, 112 S. Ct. 2031.

[81] *See, e.g.*, Conn. Gen.Stat. § 12-285c (permitting shipment and delivery of cigarettes only to cigarette distributors or dealers, warehouse operators and government employees); Okla. Stat. tit. 68, § 317.4 (shipping documents must include a statement that Oklahoma law prohibits shipping tobacco products to minors and requires the payment of applicable taxes, and the shipper must use a delivery service that requires the recipient or an adult at the same address to sign and demands proof, if the person signing appears to be under twenty-seven,

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those laws will present to the market of interstate delivery services demonstrates why Congress preempted individual state regulation in favor of a uniform federal approach.[82]

The Attorney General argues nevertheless that Congress did not intend to preempt state regulation of the delivery of illegal products.[83] But in broadly restricting

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that the person signing is an adult and is the addressee or is living at the addressee's address); Wash Rev.Code § 70.155.105 (requiring anyone mailing, shipping, or delivering cigarettes to: obtain a written statement on the first delivery to an individual certifying the recipient's age, address and understanding of relevant tobacco laws; verify this statement against a data base or obtain an approved form of photo identification; and include as a part of the shipping documents a statement that the law prohibits shipment of tobacco to anyone under eighteen and requires the payment of applicable taxes). *See also* the discussion above, in the Legal Background, of the differences in the state tobacco laws.

[82] At the time the FAAAA was enacted, Congress noted impermissible regulations in forty-one states. This "patchwork of regulation" included entry controls that varied from liberal to strict; price regulation that, for a carrier that wanted to change its prices, involved expensive and time-consuming procedures in each state the carrier operated; regulations on tariff filing; and regulation of the types of commodities carried. H.R.Rep. No. 103-677, at 86-87, *reprinted in* 1994 U.S.C.C.A.N. at 1758-59.

[83] Def.'s Mot. for Summ. J. at 14-15. The Contraband Cigarette Trafficking Act arguably preserves the states' rights to regulate the transportation of contraband cigarettes because, as noted above, it provides that federal regulation of contraband cigarettes does not affect the states' authority "to enact and enforce cigarette tax laws, to provide for the confiscation of cigarettes and other property seized for violation of such laws, and to provide for penalties for the violation of such laws." 18 U.S.C. § 2345(a). But this provision preserves only state authority to enact and enforce cigarette tax laws. The challenged provisions here relate to restricting minors' access to tobacco, not tax collection. *See* Def.'s Reply Br. in Further Support of his Mot. for Summ. J. ("Def.'s Reply Br.") at 4 (Docket Item 78) ("The Maine Legislature enacted the Tobacco Delivery Act for two purposes – but the Challenged Provisions only relate to one of those purposes, keeping tobacco out of the hands of

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state regulation of the transportation industry in the FAAAA, Congress necessarily limited the states' regulatory powers.[84] States may still regulate contraband, and even the delivery of contraband, but only if the regulation does not expressly refer to or significantly affect a carrier's prices, routes or services.[85]

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minors."). In any event, even if the challenged provisions did relate to tax collection, the 1978 provision in the Contraband Cigarette Trafficking Act predates the *Morales* Court's broad interpretation of the Airline Deregulation Act preemption provision in 1992 and Congress's enlargement of that provision in the FAAAA in 1994.

[84] The Attorney General relies on *Robertson v. State of Washington Liquor Control Board*, in which the Court of Appeals of Washington held that the FAAAA does not preempt state laws prohibiting the transportation of cigarettes on which the taxes had not been paid and providing for the seizure of vehicles used for such transportation. The court in *Robertson* determined that the Contraband Cigarette Trafficking Act "expressly preserved" Washington's authority to enforce its cigarette tax laws by seizing property used to violate those laws, and that the state laws "had no more than an 'indirect, remote, and tenuous' relationship with the deregulatory purposes of the FAAA Act." 102 Wash.App. 848, 10 P.3d 1079, 1084, 1085 (2000). Unlike *Robertson*, the Contraband Cigarette Trafficking Act does not apply to the issues raised in this case. Moreover, *Robertson* used a different definition of "related to" than the one I use here. Rather than adopting the express reference/forbidden significant effects definition from *Morales*, *Robertson* used a limited definition proposed by Justice Scalia for ERISA cases. *See id.* at 1082-83 (citing *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 335-36, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (Scalia, J. concurring)).

[85] In my earlier ruling, I considered the statement in the FAAAA's legislative history that, at the time the FAAAA was enacted, certain states, including Maine, did not impermissibly regulate carriers' prices, routes or services. I interpreted the statement as implicit approval of these existing state statutes, some of which regulated the transportation of contraband. *See N.H. Motor I*, 301 F.Supp.2d at 45-46 (citing H.R.Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1758). In light of the plain language of the FAAAA and the holdings of *UPS I* and *UPS II*, this brief statement in the legislative history, which does

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(2) Subsection 1555-C(3)(A) and 1555-C(3)(C)

The other two challenged Maine provisions, 22 M.R.S.A. §§ 1555-C(3)(A) and (C), do not impose any direct obligations on carriers, and carriers face no penalties under them. Instead, these provisions apply to tobacco retailers who ship tobacco products.[86] Therefore, they do not meet the *Morales/UPS I* standard of express reference to a carrier's services.[87]

I turn then to the other component of the *Morales/UPS I* analysis: do these subsections have a "forbidden significant effect" upon carriers' services? I conclude that subsection 1555-C(3)(C) has that effect. That subsection requires tobacco retailers to use only carriers that guarantee

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not approve any specific statutes or indicate the extent of congressional research into statutes existing at the time the FAAAA was enacted, no longer persuades me that the FAAAA does not preempt the Maine statute.

[86] The portion of the statute that contains these two provisions begins: "The following provisions apply to a tobacco retailer shipping tobacco products pursuant to a delivery sale." 22 M.R.S.A. § 1555-C(3) (preamble to both (A) and (C)).

Subsection 1555-C(3)(A) provides that "[p]rior to shipping, the tobacco retailer shall provide to the delivery service the age of the purchaser." 22 M.R.S.A. 1555-C(3)(A). Subsection 1555-C(3)(C) requires that a

> tobacco retailer utilize a delivery service that imposes the following requirements: (1) the purchaser must be the addressee; (2) the addressee must be of legal age to purchase tobacco products and must sign for the package; and 3 if the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

22 M.R.S.A. § 1555-C(3)(C).

[87] *See N.H. Motor I*, 301 F.Supp.2d at 43.

to provide certain services, specifically: that the carrier will deliver the product only to the actual purchaser of the product; will require the actual purchaser to sign for the package and to be old enough to purchase tobacco legally; and will require, as a condition of delivery if that person is under twenty-seven, a valid government-issued photo identification showing legal age to purchase tobacco.[88] The summary judgment record demonstrates that for a carrier to make those guarantees, the carrier will have to: examine every package the carrier receives with a Maine destination address to determine if it contains tobacco products; ensure that its driver delivers only to the particular addressee (not leaving the package on the porch or with whoever answers the door or with a neighbor or in the office mailroom); and in addition determine whether the addressee is under twenty-seven, and, if so, demand valid government-issued photo identification showing legal age to purchase tobacco.[89]

The analysis is similar to that for section 1555-D. Like that section, subsection 1555-C(3)(C) impermissibly affects carriers' services because it results in a carrier (who wishes to participate in this commerce) having to identify the contents of the package to determine whether it must impose the delivery conditions listed in the statute.[90] Imposing these conditions on delivery causes carriers' drivers to alter their delivery practices for packages in Maine containing tobacco products, and can delay delivery

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[88] 22 M.R.S.A. § 1555-C(3)(C); 10-144 Code Me. R. Ch. 203, § 10(C)(3).

[89] *See* Pls.' SMF, Def.'s Responsive SMF ¶¶ 23, 50, 60-67.

[90] *See UPS II*, 385 F.3d at 14; *accord Wine & Spirits Wholesalers*, 10 F.Supp.2d at 87.

of the package with tobacco products and subsequently delivered packages if the driver is unable to find the addressee to receive the package.[91] Under *UPS I*, these effects are sufficient to preempt subsection 1555-C(3)(C).[92]

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[91] *See* Pls.' SMF, Def.'s Responsive SMF ¶¶ 42-44, 51, 58, 60-67. Although the Attorney General admits that having to deliver to the addressee can cause various problems for the carrier, *see* Def.'s Responsive SMF ¶¶ 60-67, the Attorney General denies that these problems could cause delay, stating that "UPS has not studied the cost or feasibility of providing a service that restricts delivery to a particular person," *id.* ¶ 68. As I noted above, *see* footnotes 54 and 55, the associations do not need to present an empirical study to prove the delay that could logically result from these complications.

[92] *See* 318 F.3d at 336. The Attorney General responds that UPS could "charge the shipper an appropriate amount" for the extra activities. Def.'s Opp'n at 7. That response demonstrates the forbidden significant effects that prompt preemption, for it represents a direct effect on price (or profitability and hence competitiveness).

Despite the Attorney General's argument that, because of dollar amounts, I should consider the effects here not sufficient to reach the "significant" level of the "forbidden significant effect" standard, I conclude that no more is required. *See id.* at 4, 8. *Morales* should not be read to require courts to assess the actual competitiveness of a particular market to determine when effects reach the level of significance. For the same reason, I reject the Attorney General's argument that UPS was required to do more empirical research or industrial engineering studies. *See, e.g., id.* at 4, 7, 14-16; Def.'s Mot. for Summ. J. at 5-7. There is no suggestion of such a requirement in *UPS I* and *UPS II*. *Accord Witty* 366 F.3d at 383 (using logic rather than data to find significant effects); *see also Wolens*, 513 U.S. at 226, 115 S. Ct. 817 (rejecting a distinction between matters essential and unessential to airline operations in deciding preemption); *Morales*, 504 U.S. at 388, 112 S. Ct. 2031 (determining, "as an economic matter," that state regulation of false advertising will have a forbidden significant effect on fares, without mentioning any empirical data).

Therefore, I do not resolve the parties' disagreement over whether an additional two seconds are really necessary to examine every package coming to Maine, leading to an annual $144,000 expense, Def.'s Opp'n at 3-4; whether it is the Maine statute that has prompted a UPS

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Without the delivery conditions of subsection 1555-(C)(3)(C), subsection 1555-C(3)(A) has no apparent remaining purpose. It requires that a tobacco retailer tell the carrier the age of the purchaser before shipping a tobacco product.[93] This subsection results only in the carrier receiving information about the purchaser's age: the carrier does not have to do anything with this information without the requirements of subsection 1555-C(3)(C). This effect on carriers' services is not significant. I do not find subsection 1555-C(3)(A) to be preempted because it does not have a significant effect on carriers' services.[94]

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business decision not to accept certain packages or whether there are no tobacco shippers currently interested in shipping directly to Maine consumers in any event, *see* Def.'s Mot. at 12-13; Def.'s SMF ¶¶ 87-94; the cost of dealing with packages identified as containing tobacco (UPS says two dollars per package; the State attacks the basis for the estimate), Def.'s SMF ¶ 128; and the costs of training UPS's Maine personnel to comply with the delivery requirements, Def.'s Responsive SMF ¶ 88; *see* Def.'s Mot. for Summ J. at 16-17.

[93] 22 M.R.S.A. § 1555-C(3)(A); *see also* 10-144 Code Me. R. Ch. 203, § 10(C)(1).

[94] Both the associations and the Attorney General contend that the recent Supreme Court decision in *Granholm v. Heald* supports their arguments. Pls.' Notice of Post-Submission Supreme Court Authority Relevant to the Parties' Cross Motions for Summary Judgment (Docket Item 90); Def.'s Notice of Recent Relevant Precedent (Docket Item 91). But *Granholm* does not affect the outcome in this case because the questions there are different. The Court in *Granholm* invalidated state regulations that restricted out-of-state wineries' direct shipments to consumers when in-state shipments were permitted. ___ U.S. ___, ___, 161 L. Ed. 2d 796, 125 S. Ct. 1885, 1892, 2005 WL 1130571, at *5 (2005). The attack on the state regulation there was under the Commerce Clause, not the FAAAA. Moreover, the Court in *Granholm* focused extensively on the Twenty-First Amendment to the United States Constitution, which deals with alcohol, but not tobacco, and federal statutes regulating the sale of alcohol. *See id.* at 1897-1906 (determining, based on a detailed analysis of the Twenty-First Amendment and relevant statutes and caselaw, that the Amendment does not

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IV. RELIEF

The associations request a declaratory judgment under 28 U.S.C. §§ 2201 and 2202, declaring that subsections 1555-C(3)(A) and (C) are completely preempted and that section 1555-D is preempted as applied to motor and air/ground carriers.[95] Aside from his merits-related arguments, the Attorney General does not respond to the associations' request for a declaratory judgment. Whether the FAAAA preempts the challenged Maine provisions presents "a case of actual controversy" under 28 U.S.C. § 2201(a) because the parties have adverse legal interests and there is a real threat of prosecution under the challenged Maine provisions.[96] The associations are therefore entitled to the declaratory relief they request for the preempted provisions, subsection 1555-C(3)(C) and section 1555-D, but not for subsection 1555-C(3)(A), which is not preempted.

The associations also request a permanent injunction against any enforcement of subsections 1555-C(3)(A) and 1555-C(3)(C) and against enforcement of section 1555-D against motor carriers and air/ground carriers.[97] The

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permit discrimination against imported liquor); *id.* at 1907-09 (Stevens, J., dissenting) (stating that the Twenty-First Amendment allows the state regulations because "our Constitution has placed commerce in alcoholic beverages in a special category"); *id.* at 1909-27 (Thomas, J., dissenting) (questioning the majority's interpretation of statutes and caselaw on the sale of alcohol).

[95] Pls.' Compl. ¶¶ 1, 2(a), (b), 46-49(b).

[96] *See* Pls.' SMF, Def.'s Responsive SMF ¶ 92 (Maine is enforcing the challenged provisions); 10B Charles Alan Wright, *et al.*, *Federal Practice and Procedure*, § 2757, at 473, 486-87 (3d ed.1998).

[97] Pls.' Compl. ¶¶ 1, 2(c), 49(c); Pls.' "As Applied" Mot. for Summ. J. at 23-25.

Attorney General does not argue that injunctive relief is inappropriate. To issue a permanent injunction, I must determine that: (1) the plaintiffs prevail on the merits; (2) the plaintiffs would suffer irreparable injury in the absence of injunctive relief; (3) the harm to the plaintiffs would outweigh the harm that the defendant would suffer from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction.[98]

The associations are not entitled to injunctive relief for subsection 1555-C(3)(A) because they have not prevailed on the merits of that claim. The associations have prevailed on the merits of their preemption claims for subsection 1555-C(3)(C) and section 1555-D of the Maine statute. The associations' members would suffer irreparable injury without injunctive relief because the enforcement of the preempted provisions causes at least one carrier to alter its uniform delivery procedures for Maine packages and affects its business by interfering with its timely and efficient delivery of packages.[99] There is no suggestion that any such loss could be recovered from the State.

The harm to the associations' members from enforcement of the preempted provisions would outweigh the harm to the State from imposing the requested injunction. The injunction the associations request would enjoin enforcement of subsection 1555-C(3)(C) and enforcement of section 1555-D against motor and air/ground carriers: the

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[98] *A.W. Chesterton Co. v. Chesterton*, 128 F.3d 1, 5 (1st Cir.1997).

[99] *See United Parcel Serv., Inc. v. Flores-Galarza* ("*UPS* "), 210 F.Supp.2d 33, 44 (D.P.R.2002); *see also UPS I*, 318 F.3d at 337 (affirming the district court's determination that injunctive relief was appropriate).

State could enforce the rest of the statute, and could still enforce section 1555-D against anyone other than motor and air/ground carriers. Much of the statute would thus remain unaffected by enjoining enforcement of the pre-empted provisions.

Finally, an injunction would not adversely affect the public interest. As the trial court noted in *UPS*, Congress determined that the FAAAA preemption provisions serve the public interest by reducing the inefficiency, costs, inhibition of innovation and technology, and limitations on the expansion of markets caused by state regulation.[100]

The Attorney General does argue that any ruling and resulting declaratory and injunctive relief should apply only to UPS.[101] But that limitation would be inconsistent with the congressional purpose, for it would permit one carrier to have privileges that others do not, an intrusion into the competitive marketplace.[102] Moreover, the words of the statute are contrary: A state law is preempted if it "relate[s] to a price, route or service *of any* motor carrier," or "of an air carrier or carrier affiliated with a direct air

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[100] *See* 210 F.Supp.2d at 44-45; H.R.Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759; *see also* Pub.L. No. 103-305, § 601(a) (findings).

[101] Def.'s Mot. for Summ. J. at 11 n.8.

[102] *See* H.R.Rep. No. 103-677, at 82, 87, *reprinted in* 1994 U.S.C.C.A.N. at 1754, 1759 (the purpose behind the FAAAA preemption provisions is to uniformly regulate carriers, regardless of their corporate form, by eliminating the patchwork of state regulation and the competitive advantage air carriers enjoyed over other carriers under the Airline Deregulation Act).

carrier."[103] I therefore will not limit the ruling or the relief to UPS.[104]

The plaintiffs shall submit a proposed injunction by June 17, 2005, after first consulting with the Attorney General's office to resolve all issues as to form and scope not resolved in this opinion. The relief proposed shall "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[105] The defendant shall file any response by June 24, 2005.

V. CONCLUSION

Although the Maine Tobacco Delivery Law has very worthy motives, I conclude that two provisions "relate[ ] to" a "service of any motor carrier" or air/ground carrier "with respect to the transportation of property," and are therefore preempted.[106] Section 1555-D expressly references

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[103] 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (emphasis added).

[104] The Attorney General has also requested briefing on "the severability issue": whether any of the challenged Maine provisions that remain are enforceable without the preempted provisions. Def.'s Mot. for Summ. J. at 19. There is no need for briefing on severability in light of my separate preemption analysis for each challenged provision and the absence of any argument from the associations that the preemption of one or some of the challenged provisions affects the enforceability of the rest.

[105] *UPS I*, 318 F.3d at 337 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)).

[106] 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). Each side suggests that a parade of horribles will follow from whatever ruling I make. The Attorney General says that a ruling in favor of the associations will call into question state laws about delivery of guns, stolen property, drugs, explosives, liquor, etc. *See* Def.'s Mot. for Summ. J. at 5. The associations have said that a ruling in the Attorney General's favor will leave them subject to whatever new product becomes the next subject of state

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carriers, and significantly affects carriers by causing them to alter their procedures for preparing packages for delivery and for returning packages containing tobacco products. Subsection 1555-C(3)(C) imposes conditions on tobacco shippers that inevitably impose significant effects on a carrier's delivery services: unless a carrier is willing to make the required guarantees, it is foreclosed from this part of the transportation market. Whatever one might think of the social benefits or costs of delivering tobacco products, the effects of sections 1555-D and 1555-C(3)(C) are the types of effects that the FAAAA forbids. The effects are not "too tenuous, remote or peripheral" to escape preemption.[107]

I therefore **GRANT** the plaintiffs' motion for summary judgment and **DENY** the defendant's motion for summary judgment for section 1555-D and subsection 1555-C(3)(C) of the Maine statute because the FAAAA preempts these provisions. I **DENY** the plaintiffs' motion for summary judgment and **GRANT** the defendant's motion for summary

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concern, for example, herbal and dietary supplements or whatever else is next on an ever-changing list of popular concern. *See* Pls.' Reply Mem. in Support of Facial Mot. for Summ. J. at 3 (Docket Item 18). The answer to both these arguments is that each case will have to be argued and resolved on its own merits. I do note that *Morales* suggests that some things are too distantly related to be preempted (in that case, state laws against prostitution and gambling as they might be applied to passengers in an aircraft). *See* 504 U.S. at 390, 112 S. Ct. 2031.

[107] *Morales*, 504 U.S. at 390, 112 S. Ct. 2031. The State, through subsection 1555-C(3)(C), has essentially required carriers to provide a service that guarantees delivery only to adults, and through section 1555-D has made the carriers' service less efficient by requiring them to alter their delivery procedures to identify, determine if they can deliver, and potentially contact the shipper to retrieve packages containing tobacco products. Those "service" requirements are hardly tenuous, remote or peripheral regulations.

judgment on subsection 1555-C(3)(A), which is not preempted by the FAAAA. I **DENY** the plaintiffs' request for declaratory relief for subsection 1555-C(3)(A), but I **GRANT** the plaintiffs' request for declaratory relief for section 1555-D and subsection 1555-C(3)(C), and declare that the FAAAA preempts 22 M.R.S.A. § 1555-C(3)(C) in its entirety and preempts 22 M.R.S.A. § 1555-D as applied to motor carriers and air/ground carriers. I will issue an injunction after the parties submit their proposed language.

So ORDERED.

DATED THIS 27TH DAY OF MAY, 2005

D. BROCK HORNBY

UNITED STATES DISTRICT JUDGE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL., PLAINTIFFS v. G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE, DEFENDANT

CIVIL NO. 03-178-B-H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

324 F. Supp. 2d 231; 2004 U.S. Dist. LEXIS 12105

June 30, 2004, Decided

COUNSEL: For NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., VERMONT TRUCK AND BUS ASSOCIATION, INC., Plaintiffs: MICHAEL A. NELSON, Jensen, Baird, Gardner & Henry, Portland, ME.

For NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., VERMONT TRUCK AND BUS ASSOCIATION, INC., Plaintiffs: LAWRENCE R. KATZIN, PAUL T. FRIEDMAN, RUTH N. BORENSTEIN, Morrison & Foerester LLP, San Francisco, CA.

For G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant: MELISSA REYNOLDS O'DEA, PAUL D. STERN, Office of the Maine Attorney General, Augusta, ME.

JUDGES: D. BROCK HORNBY, UNITED STATES DISTRICT JUDGE.

OPINION BY: D. BROCK HORNBY

OPINION:

ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PARTIAL MOTION TO DISMISS

Earlier I ruled (on the plaintiff carrier associations' motion) that federal law does not preempt certain challenged provisions of Maine's Tobacco Delivery Law. I now grant partial summary judgment to the Maine Attorney General on that claim. I also conclude that the carrier associations have standing to assert an as-applied preemption challenge to the statute even though they rely on its effects on a particular association member.

ANALYSIS

(1) The Facial Challenge

New Hampshire Motor Transport Association, Massachusetts Motor Transport Association, Inc., and Vermont Truck & Bus Association, Inc. ("the carrier associations") are non-profit trade associations whose members are in the interstate transportation business. Previously, they moved for summary judgment arguing that, by their express terms, three provisions of Maine's Tobacco Delivery Law – 22 M.R.S.A. §§ 1555-C(3)(A), 1555-C(3)(C), and 1555-D – are facially preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). *See N.H. Motor Transp. Ass'n v. Rowe,* 301 F. Supp. 2d 38, 40 (D. Me. 2003). I disagreed, concluding that federal law does not completely foreclose Maine from exercising its traditional police powers to restrict delivery of tobacco. *Id.* I therefore held that the FAAAA did not facially preempt the Maine statutory provisions, and denied the carrier associations' motion for summary judgment. *Id.* at 46.

In light of my earlier ruling, the defendant Maine Attorney General now requests that I enter partial summary judgment in his favor on all Counts as to any facial challenge. The carrier associations resist this motion arguing that: (1) a further "evidentiary showing" is necessary to rule on this issue; (2) my earlier decision relied on statutes not addressed by the parties; and (3) the carrier associations' Complaint does not assert a facial challenge.

First, discovery or an "evidentiary showing" on the effect of the challenged provisions of Maine's Tobacco Delivery Law is not necessary to a ruling on a facial preemption challenge. As the carrier associations argued when they brought the motion initially, such a ruling examines only the express terms of the statute, not the actual effect of the law. *See id.* at 40 n.2.

Second, I did take judicial notice of Maine's and other states' statutes to determine whether Maine was exercising a traditional police power in restricting the delivery of tobacco. *See id.* at 44-45 & n.13. That research and analysis was appropriate, regardless of whether the parties cited the particular statutes to which I referred. (It is not unusual for a judge to rely on a case or statute that the parties did not cite.) It was essential to examine such laws in assessing the presumption against preemption when Congress legislates in a field traditionally regulated by a state pursuant to their historic police powers. *See, e.g., United Parcel Serv., Inc. v. Flores-Galarza,* 318 F.3d 323, 336 (1st Cir. 2003); *Greenwood Trust Co. v. Mass.,* 971 F.2d 818, 823 (1st Cir. 1992).

Third, I am perplexed by the carrier associations' argument that "there is no 'Facial Preemption Claim' in the Complaint on which the Attorney General could be

granted judgment." Pls.' Opp'n to Def.'s Mot. for Partial Summ. J. and Partial Mot. to Dismiss ("Pls.' Opp'n") at 2 (Docket Item 41). To be sure, the Complaint states two causes of action (under the Supremacy Clause and the Declaratory Relief Act), and neither is entitled "Facial Challenge." But the Complaint also asserts that the Maine provisions are preempted by federal law because they "expressly refer to" and "have a significant effect on" motor carrier services. *See* Compl. ¶¶ 30-31 (Docket Item 1).

It was the carrier associations who embarked upon a bifurcated summary judgment strategy, first asserting a facial challenge "based on the face of the statute," and promising, if their facial attack was unsuccessful, an as-applied challenge.[1] At the conference of counsel held on January 8, 2004, the carrier associations' attorney stated:

> What we have tried to do is make an initial motion to try to get an expeditious resolution without going into the facts *based on the face of the statute,* expressed terms of the statute, saying that it is preempted without making a showing

[1] In a footnote, the carrier associations state: "The 'facial' and 'as-applied' labels are not particularly suitable here because, in this action, the Carriers only challenge 22 M.R.S.A. section 1555-D 'as applied' to motor carriers and air/ground intermodal carriers. (*See* Compl. ¶ 2(b).) That 'as applied' limitation existed even in the Carriers' 'express terms' motion. Nonetheless, for simplicity, the Carriers will use the label 'facial' to refer to their 'express terms' motion, and will use the label 'as applied' to refer to their forthcoming evidence-based 'in effect' motion." Pls.' Opp'n at 2 n.1. To the extent I understand the footnote, the carrier associations are stating that they can challenge only the Maine law provisions that apply to their members as ground carriers (*i.e.*, they cannot challenge the provisions as they are applied to other entities). In any event, the choice of terms used in labeling these different challenges in no way affects the substantive outcome of my decision on the "facial" or "express terms" motion.

> in all ways in which the challenged provisions affects carriers' prices throughout. So we want to try and do this, move for summary judgment just based on the expressed terms of the statute.

Tr. of Conf. of Counsel at 3 (Jan. 8, 2004) (Docket Item 25) (emphasis added). Thus, it was clear to everyone that as a first step the carrier associations were pursuing a facial challenge. At the conference, I later stated "Assuming I'm going to deal with the facials first, since you are here I want to consider what might happen in either direction. If I don't strike it down facially then there will be the issue [on the] facts, I take it." *Id.* at 6.

Now, the Maine Attorney General asks for partial summary judgment on the same facial challenge issue the carrier associations brought earlier. Although the "facial challenge" is not a cause of action in the carrier associations' Complaint, the Maine Attorney General is certainly entitled to request partial summary judgment to limit the scope of relief available or the legal breadth of the causes of action. In my earlier order, I concluded that on a facial challenge, determined only by reading the express terms of the statute, the FAAAA did not preempt the challenged provisions of Maine Tobacco Delivery Law. *N.H. Motor Transp. Ass'n,* 301 F. Supp. 2d at 46. I therefore **GRANT** the defendant's motion for partial summary judgment on all counts as to any facial FAAAA preemption challenges to 22 M.R.S.A. §§ 1555-C(3)(A), 1555-C(3)(C), and 1555-D.

(2) Associational Standing

The Maine Attorney General moves for dismissal of the Complaint on the basis that the plaintiff carrier

associations lack standing to bring any as-applied challenges on behalf of their members.[2] Primarily, the Maine Attorney General is concerned that the whole premise of the plaintiffs' challenge to the law is based upon its effect on United Parcel Service ("UPS"), yet UPS is not a party to the suit. The Maine Attorney General feels unfairly prejudiced in not being able to treat UPS as a party (with any procedural or substantive advantages that follow) in preparing the case for trial.

The United States Supreme Court has recognized that standing doctrine is comprised of both Article III constitutional considerations and prudential concerns. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow,* No. 02-1624, 159 L. Ed. 2d 98, 124 S. Ct. 2301 2004 U.S. LEXIS 4178, *16-17 (June 14, 2004). For associations like these carrier

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[2] The carrier associations argue that the Maine Attorney General's motion to dismiss should be denied as untimely under Fed. R. Civ. P. 12(b) because the Attorney General had previously filed an Answer, and "[a] motion making any of these defenses shall be made before pleading." *See* Pls.' Opp'n at 4 n.6 (citing Fed. R. Civ. P. 12(b)(6)). The Maine Attorney General filed his Answer on November 3, 2003. His motion to dismiss was filed April 15, 2004. But in his Answer the Maine Attorney General raised the affirmative defense that the plaintiffs lacked standing. *See* Answer, Seventh Affirmative Defense at 7 (Docket Item 15). Thus, his so-called motion to dismiss only brought forward for hearing and decision a defense he had timely raised. Moreover, the defense of failure to state a claim is timely up until trial. Under Fed. R. Civ. P. 12(h)(2), "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgments on the pleadings, *or at the trial on the merits*." (emphasis added.) *See also* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1361, at 446-47 (1990) ("Moreover, under Rule 12(h) the defenses of . . . Rule 12(b)(6) . . . are preserved from the waiver mechanism in Rule 12(h). Thus, motions raising any of these matters may be considered by the court even when interposed after the responsive pleading has been filed, although technically they no longer are Rule 12(b) motions.").

associations, in *Hunt v. Wash, State Apple Adver. Comm'n*, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977), the Supreme Court announced a three-part associational standing test: "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. The Maine Attorney General asserts that the carrier associations here lack standing under the third prong of *Hunt*, arguing that the participation of individual members – primarily UPS – is required. This third prong of *Hunt* is prudential in nature, raising concerns of "administrative convenience and efficiency." *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996).

In their as-applied challenge, the carrier associations believe that they need only show that Maine's Tobacco Delivery Law has a "forbidden significant effect," *see Flores-Galarza*, 318 F.3d at 335, on "a price, route, or service of *any* motor carrier." 49 U.S.C. § 14501(c)(1) (1997) (emphasis added). In light of this FAAAA statutory language, the carrier associations intend to rely on the Maine Tobacco Delivery Law's effects on only one association member, UPS. *See* Tr. of Conf. of Counsel at 8-9 (Mar. 29, 2004) (Docket Item 31) (The plaintiffs' counsel stated, "So in a way because it's my burden to show the significant effect, and if I'm prepared to do it with UPS alone, it seems to me that's my risk . . . "); Pls.' Opp'n at 9-10 (stating that "the Carriers can prevail by showing the Challenged Provisions' effect on a single carrier" and that

"UPS is the association member whose experience with the Challenged Provisions will provide the basis for the Carriers' as-applied challenge"). Obviously, therefore, both sides will require detailed information about UPS and the Maine law's effect upon it. Does this mean that the claim asserted by the carrier associations requires the participation of this individual association member within the meaning of *Hunt*? In the absence of UPS as a party, the Maine Attorney General raises a number of practical concerns regarding access to information not in the possession of the associations, but instead in the sole control of nonparty UPS:[3]

> The members seek relief from the Court but refuse to subject themselves to the normal discovery to which they would be subject under the Rules if they sought the relief directly. The discovery devices available between parties are

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[3] The Maine Attorney General complains that obtaining discovery on other association members will also be hindered.

> Defendant cannot reasonably defend this case without the participation of those common carriers who plaintiffs allege have historically delivered tobacco to consumers, or have a desire to do so. It is no solace that plaintiffs suggest they must carry their burden (which is in actuality the burden of their members), and will present whatever facts they and their members believe is appropriate. Discovery is not so limited as to allow one party to completely control discovery and the exploration of facts. Plaintiffs' strategy of using associational standing to challenge a statute on behalf of its members but protect its members from discovery should not be countenanced.

Def.'s Mot. for Partial Summ. J. and for Partial Mot. to Dismiss at 8 (Docket Item 32). However, even if UPS were a party plaintiff, the Maine Attorney General would still have to obtain discovery from the other association members through nonparty procedures. I therefore address only the absence of UPS from the lawsuit.

> there for a reason: to allow for efficient, inexpensive and fair resolution of disputes utilizing, *inter alia,* interrogatories, requests for admissions and part depositions. And, particularly from the defendant's standpoint in a case brought in Maine where the plaintiffs appear to be relying upon one large carrier [UPS], having discovery *in Maine* is logistically and economically important. Simply put, third-party discovery in this case is neither fair, nor efficient, nor inexpensive. We do not believe that the courts envisioned associational standing to be used, as it is here, as a sword to obtain relief for an association's members but, at the same time, to shield those members from the normal and requisite discovery that any plaintiff subjects itself to when coming to federal court seeking relief.

Def.'s Reply at 5 (Docket Item 42).

In determining whether individual participation is necessary, however, the focus is on the nature of the relief requested (injunctive relief versus damages), not on discovery. In fact, *Hunt*'s third prong derives from the Supreme Court's decision in *Warth v. Seldin,* 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), where the Court stated:

> So long as the nature of the claim and of the relief sought does not make the individual participation of *each* injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id. at 511 (emphasis added). "Accordingly, it appears that an association may assert a claim that requires participation by *some* members." *Hosp. Council of W. Pa. v. City of*

Pittsburgh, 949 F.2d 83, 89 (3d Cir. 1991) (emphasis in original). *Accord Penn. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 285 (3d Cir. 2002); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601-02 (7th Cir. 1993). Associational standing is generally granted in cases seeking injunctive relief rather than damages, because individualized proof is not necessary and the relief usually inures to the benefit of all members injured. *See Warth*, 422 U.S. at 515.

Under First Circuit precedent, in a case seeking only injunctive relief, like this case, where there is no need to allocate damages to each individual member, the basis for the requirement of individualized proof is missing. *See Playboy Enters., Inc. v. Public Serv. Comm'n of Puerto Rico*, 906 F.2d 25, 35 (1st Cir. 1990); *R.I. Brotherhood of Correctional Officers v. R.I.*, 357 F.3d 42, 48 (1st Cir. 2004) (citations omitted); *Camel Hair and Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 12 (1st Cir. 1986). *See also Retired Chicago Police Ass'n*, 7 F.3d at 602-03 (citations omitted); *Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 307 F. Supp. 2d 164, 173 (D. Me. 2004).[4]

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[4] At oral argument, the Maine Attorney General argued that proving the factual (as-applied) inquiry for preemption is akin to proving damages. It is a creative argument, but ultimately unpersuasive in light of the relief requested. The plaintiffs' claim here depends "not on evidence that differs from member to member" like damages, but instead upon the adverse effects upon one association. *See Camel Hair*, 799 F.2d at 12. A claim for injunctive relief could only be akin to a damages claim if the plaintiffs were required to prove and allocate "substantial forbidden effects" among more than one association member. Here, there is no need to allocate, distribute or quantify these effects among various association members. Instead, "the relief sought . . . will affect all the members in the same way" (*i.e.*, they all would not be required to conform with the statute), and "there is no conflict here

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In fact, the First Circuit recognizes that although the opposing party may need information from individual association members, such discovery may be obtained via various techniques (*e.g.*, subpoena *duces tecum*), without making the members parties to the action. *See Playboy*, 906 F.2d at 35-36. "Just because a claim may require proof specific to individual members of an association does not mean the members are required to participate *as parties* in the lawsuit." *Id.* at 35 (emphasis in original). Although third-party discovery for a nonparty like UPS may be more cumbersome and somewhat more costly, discovery for parties and nonparties overall is fairly comparable.[5] I

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between the needs and interests of the members" (*i.e.*, no one member is seeking more relief than another). *Id.*

[5] Instead of merely noticing a deposition of UPS as a party, the Maine Attorney General must subpoena UPS under Fed. R. Civ. P. 45. Instead of filing a Fed R. Civ. P. 34 Request for Production of Documents, the Maine Attorney General must issue a subpoena *duces tecum* under the same Rule. *See* Fed. R. Civ. P. 34(c). However, the scope of discovery will remain constant. *See* Fed. R. Civ. P. 45, Advisory Committee Notes, 1991 Amendment, Subdivision (a) ("The person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district . . . within which the subpoena can be served. The nonparty witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34"); Fed. R. Civ. P. 45, Advisory Committee Notes, 1946 Amendment. Subdivision (d) (stating that Fed. R. Civ. P. 45(d)(1) "properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26(b)"). *See also* William W. Schwarzer, Lynn H. Pasahow & James B. Lewis, *Civil Discovery and Mandatory Disclosure: A Guide to Efficient Practice* § 6[B][6], at 6-21-22 (2d ed. 1994); 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2209, at 393 & n.6 (1994); Fed. R. Civ. P. 45, Advisory Committee Notes, 1970 Amendment (stating that both Fed. R. Civ. P. 45 and Fed. R. Civ. P. 34 also allow for inspection and copying of documents).

Although Fed. R. Civ. P. 33 interrogatories may not be served upon nonparties, depositions upon written questions can be taken of nonpar-

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conclude that the discovery burdens are not sufficient to overcome associational standing and to require UPS to prosecute the lawsuit.[6]

I therefore conclude that the carrier associations have standing to pursue an as-applied preemption challenge. However, if it turns out that by virtue of the carrier associations' conduct that the Maine Attorney General's discovery is excessively inefficient or hampered, I will reconsider this ruling under *Hunt*'s third prong.[7]

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ties under Fed. R. Civ. P. 31. They may provide the functional equivalent of interrogatories. *See* Jay E. Grenig and Jeffrey S. Kinsler, *Handbook of Federal Civil Discovery and Disclosure* § 6.2 (2d ed.).

Finally, nonparties are not required to make initial disclosures under Fed. R. Civ. P. 26, nor are they required to respond to requests for admission under Fed. R. Civ. P. 36. But these devices are most useful as applied to the parties to the lawsuit in any event, here the associations.

[6] I am aware that Magistrate Judge Kravchuk has been working with the parties to ensure fair and efficient access to discovery information on subjects such as where the depositions of various UPS personnel will take place, the proper place for Fed. R. Civ. P. 30(b)(6) depositions, etc.

[7] I was initially concerned that UPS's refusal to join as a party plaintiff (it did so), represented by the identical law firm, in an FAAAA challenge to a Puerto Rico tax statute, *see UPS v. Flores-Galarza*, 210 F. Supp. 2d 33 (D.P.R. 2002), was only a tactical maneuver to increase the expense of the Maine Attorney General in litigating this case. At oral argument, however, the plaintiffs' lawyer advanced reasons why the associations are the party plaintiffs, one of those being that it can be disadvantageous for a particular company to challenge a tobacco-regulating law. *See* Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.9, at 615 & n.135 (1984) (citing Joseph L. Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 Nat. Res. J. 76, 78-79 (1973)) (stating individuals may be reluctant to be named plaintiffs and noting that association members may fear being individually identified with locally unpopular causes).

CONCLUSION

The defendant's motion for partial summary judgment is **GRANTED**. The defendant's partial motion to dismiss is **DENIED**.

SO ORDERED.

DATED THIS 30TH DAY OF JUNE, 2004

/s/ D. BROCK HORNBY

UNITED STATES DISTRICT JUDGE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL., PLAINTIFFS v. G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE, DEFENDANT

CIVIL NO. 03-178-B-H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

301 F. Supp. 2d 38; 2004 U.S. Dist. LEXIS 1600

February 6, 2004, Decided

COUNSEL: For NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., VERMONT TRUCK AND BUS ASSOCIATION, INC., Plaintiffs: MICHAEL A. NELSON, Jensen, Baird, Gardner & Henry, Portland, ME.

For NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., VERMONT TRUCK AND BUS ASSOCIATION, INC., Plaintiffs: LAWRENCE R. KATZIN, PAUL T. FRIEDMAN, RUTH N. BORENSTEIN, Morrison & Foerester LLP, San Francisco, CA.

For G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant: MELISSA REYNOLDS O'DEA, Assistant Attorney General, Augusta, ME.

JUDGES: D. BROCK HORNBY, UNITED STATES DISTRICT JUDGE.

OPINION BY: D. BROCK HORNBY

OPINION:

MEMORANDUM DECISION ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Does a federal statute that regulates interstate trucking preempt Maine's Tobacco Delivery Law, a law newly enacted to regulate delivery sales[1] of cigarettes and reduce teens' access to tobacco? Three truckers' associations have sued the Maine Attorney General seeking a declaration that federal law preempts the Maine legislation and an injunction against its enforcement. The truckers have moved for immediate summary judgment arguing that on their face federal and state law are in direct conflict and that the Maine law must give way. I disagree. I conclude that federal law does not completely foreclose Maine from exercising its traditional police powers to restrict delivery of tobacco. I therefore DENY the truckers' motion, pending further development of the record on how the law is applied.[2]

I. FACTS

New Hampshire Motor Transport Association, Massachusetts Motor Transport Association, Inc., and Vermont

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[1] Generally speaking, delivery sales are sales made by telephone, the internet, or other means such that the tobacco has to be delivered to the purchaser. 22 M.R.S.A. § 1551(1-B) (2003).

[2] At this stage of the proceedings, the truckers have asserted a facial preemption argument (determined by reading only the words of the Maine statute), not an as-applied challenge (determined by examining the actual effect of the law). The Maine Attorney General agreed at a January 8, 2004 conference of counsel that there is no pending cross-motion for summary judgment, and therefore the truckers' motion to strike is moot.

Truck & Bus Association, Inc. ("the truckers") are non-profit trade associations whose members are in the interstate transportation business. The truckers have brought suit against the Maine Attorney General to challenge provisions of Maine's Tobacco Delivery Law, 22 M.R.S.A. § 1551 *et seq.*, enacted on June 9, 2003. According to its title, the Tobacco Delivery Law is intended to regulate the delivery and sale of tobacco products, and to prevent the sale of tobacco products to minors. 2003 Me. Laws 444. *See also* L.D. 1236, Summary (121st Me. Legis. 2003); Comm. Amend. A to H.P. 910, L.D. 1236 (121st Me. Legis. 2003).

The truckers argue that, by their express terms, three provisions – 22 M.R.S.A. §§ 1555-C(3)(A), 1555-C(3)(C), and 1555-D – are facially preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA").[3] Section 1555-C(3)(A) directs that when tobacco retailers ship products pursuant to a delivery sale, the tobacco retailers must give the delivery service the age of the purchaser. Section 1555-C(3)(C) directs that tobacco retailers use only a delivery service that: (a) requires the purchaser and the addressee to be the same person; (b) requires the addressee to be of legal age to purchase tobacco products; and (c) requires the addressee to sign for the package, and, if under 27 years old, to present a valid identification showing proof of legal age. Section 1555-D, entitled "Illegal Delivery of Tobacco Products," provides:

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[3] That statute extends to trucking so as to level the playing field between air and motor carriers who, despite conducting similar operations, previously faced a patchwork of inconsistent regulation. H.R. Conf. Rep. No. 103-677, at 82, 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754, 1759 (citing *Federal Express Corp. v. California Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991)).

> A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer.[4]

The truckers are presenting a "facial" challenge to the Maine law, arguing that preemption can be determined merely by reading its terms. Therefore, I do not at this point have information on how the law is actually being enforced or what its present effect is.[5]

II. ANALYSIS

A. Federal Preemption and the FAAAA

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall

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[4] Section 1555-D provides that a transporter is "deemed to know that package contains a tobacco product" if it is marked in accordance with section 1555-C(3)(B) ("The tobacco retailer shall clearly mark the outside of the package of tobacco products to be shipped to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the tobacco retailer."), or "if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section."

[5] As of January 2004, no administrative rules have been adopted or proposed by Maine's Department of Human Services or Department of Administrative and Financial Services regarding the implementation of 22 M.R.S.A. §§ 1555-C, 1555-D. Human Services did publish rules implementing 22 M.R.S.A. § 1551-A. *See* Me. Code R. 10-144-203 (2004).

On August 28, 2003, the Tobacco Enforcement Coordinator of the State of Maine Office of the Attorney General did send letters to delivery services explaining the law's requirement. *See* Pls.' Statement of Material Facts ¶ 4.

be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 1, cl. 2. Because of the Supremacy Clause, state laws that "interfere with, or are contrary to" constitutional federal law are preempted. *Greenwood Trust Co. v. Massachusetts,* 971 F.2d 818, 822 (1st Cir. 1992), *cert. denied,* 506 U.S. 1052, 122 L. Ed. 2d 129, 113 S. Ct. 974 (1993) (quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 211, 6 L. Ed. 23 (1824)). According to the Supreme Court, "pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992) (quoting *FMC Corp. v. Holliday,* 498 U.S. 52, 56-57, 112 L. Ed. 2d 356, 111 S. Ct. 403 (1990)). Whether express or implied, the fundamental question is Congress's intent, as revealed in the language of the provisions as well as the structure and purpose of the statute. *See United Parcel Service, Inc. v. Flores-Galarza,* 318 F.3d 323, 334 (1st Cir. 2003) (citing *Morales,* 504 U.S. at 383). *See also Rhode Island Public Towing Assoc., Inc. v. State of Rhode Island,* 1997 U.S. Dist. LEXIS 3316, *9 (D. R.I. 1997) (citing *Morales,* 504 U.S. at 383; *Greenwood Trust,* 971 F.2d at 823; *French v. Pan Am Express, Inc.,* 869 F.2d 1, 2 (1st Cir. 1989)).

The FAAAA is a constitutional law passed by Congress to regulate interstate trucking. The purpose of the FAAAA is to prevent states from interfering with the goal of federal deregulation by imposing regulations of their

own.[6] *Flores-Galarza*, 318 F.3d at 335 (citing *Morales*, 504 U.S. at 378). Congress was explicit as to the law's preemptive effect:

> [A] State, political subdivision of a State, or political authority of 2 or more states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (1997).[7] The First Circuit recently interpreted identical language in a parallel preemption

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[6] According to the federal drafters, a patchwork of state regulations of carriers, including "entry controls, tariff filing and price regulation, and types of commodities carried," had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets." H.R. Conf. Rep. No. 103-677, at 86-87, *reprinted in* 1994 U.S.C.C.A.N. at 1758-59.

[7] A number of state regulations and controls are expressly saved from preemption, for example: the safety regulatory authority of a state with respect to motor vehicles, the authority of a state to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a state to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization. *See* 49 U.S.C. § 14501(c)(2).

None of the express exemptions applies to the challenged Maine Tobacco Delivery Law provisions. This is not a case about cargo liability or safety over the road, like speed limits or the transportation of hazardous materials. Tobacco is not hazardous in transit, but only when consumed. However, the quoted list is not exclusive, although Congress did not want states to use safety rules as a guise for economic regulation. H.R. Conf. Rep. No. 103-677, at 84, *reprinted in* 1994 U.S.C.C.A.N at 1756. ("This list is not intended to be all inclusive. . . . The conferees do not intend the regulatory authority which States may continue to exercise . . . to be used as a guise for continued economic regulation. . . .").

provision.[8] It ruled that the phrase "related to" has a broad meaning in ordinary usage, and when used in the FAAAA the preemption provision must likewise be given a broad reach.[9] *See Flores-Galarza,* 318 F.3d at 335. The First Circuit has concluded that state laws and regulations "having a connection with or reference to" a motor carrier's prices, routes or services are eligible for preemption. *See id.* (citing *Morales,* 504 U.S. at 384). According to the First Circuit, "[a] sufficient nexus [for preemption] exists if the law expressly references the [motor] carrier's prices, routes or services, *or* has a 'forbidden significant effect' upon the same." *Id.* (emphasis added) (citing *Morales,* 504 U.S. at 388).

B. Sections 1555-C(3)(A) and 1555-C(3)(C)

The truckers challenge sections 1555-C(3)(A), 1555-C(3)(C), and 1555-D. Sections 1555-C(3)(A) and 1555-C(3)(C), however, apply only to tobacco retailers who ship tobacco products. These sections do not apply to delivery carriers, and truckers face no penalties under these provisions. 22 M.R.S.A. § 1555-C(3) ("The following provisions apply to a tobacco retailer shipping tobacco products pursuant to a delivery sale."). To be sure, the provisions do

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[8] In *Flores-Galarza,* the First Circuit interpreted 49 U.S.C. § 41713(b)(4)(A), a parallel provision that contains text identical to 49 U.S.C. § 14501(c)(1) but applies to air rather than motor carriers.

[9] The First Circuit observed that in passing the FAAAA, Congress did not intend to alter the broad preemption interpretation adopted by the United States Supreme Court interpreting a comparable ERISA provision in *Morales,* even though the Supreme Court later stepped back from this expansive preemption interpretation in ERISA cases. *Flores-Galarza,* 318 F.3d at 334 n.17 (citing H.R. Rep. No. 103-240, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1676, 1755).

force retailers to use delivery carriers that offer certain services. *See* 22 M.R.S.A. § 1555-C(3)(C) (requiring tobacco retailers to use a delivery service that requires the purchaser to be the addressee, the addressee to be of legal age to purchase tobacco products and sign for the package, and, if the addressee is under 27 years old, to present a valid identification showing proof of age); 22 M.R.S.A. § 1555-C(3)(A) (requiring the tobacco retailer, prior to shipping, to provide the delivery service the age of the purchaser). Ultimately that restriction may significantly affect the business of interstate trucking, but that can be determined only by examining the law as it is applied, not by the facial challenge that the truckers have raised in this motion. Sections 1555-C(3)(A) and 1555-C(3)(C) do not facially apply to carriers and do not expressly reference motor carrier prices, routes or services. I therefore conclude that 22 M.R.S.A. §§ 1555-C(3)(A) and 1555-C(3)(C) are not facially preempted by the FAAAA, 49 U.S.C. § 14501(c)(1).[10]

C. Section 1555-D

Section 1555-D "refers to" motor carrier services directly: "A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer." 22 M.R.S.A. § 1555-D. The truckers point out that this

[10] I express no opinion as to whether 22 M.R.S.A. §§ 1555-C(3)(A) and 1555-C(3)(C) may in practice have a forbidden significant effect upon motor carrier prices, routes or services.

provision will require them to ensure that any packages containing tobacco products are delivered only if the shipper is licensed or the packages are addressed to licensed cosignees. Ennis Decl. ¶ 4. Thus, it satisfies one of the criteria that lead to preemption under the First Circuit test. But in determining preemption I must also assume that "the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Greenwood Trust,* 971 F.2d at 823 (citing *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)). That is so because the authority to preempt state law is "an extraordinary power . . . that we must assume Congress does not exercise lightly." *Id.* (*citing Gregory v. Ashcroft,* 501 U.S. 452, 460, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)). According to the First Circuit ruling on the parallel FAAAA preemption question for air transport, there is a presumption *against* preemption when Congress legislates in a field that has traditionally been regulated by the states. *Flores-Galarza,* 318 F.3d at 336 (internal citations omitted). *See also Hillsborough County v. Automated Medical Labs., Inc.,* 471 U.S. 707, 715, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985) (recognizing presumption that state and local regulation of matters related to health and safety is not invalidated under the Supremacy Clause); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996); *Rice,* 331 U.S. at 230.

In *Flores-Galarza,* the First Circuit found federal preemption of a Puerto Rico law because the law dealt with air transportation, an area where Congress, not the

states, has had a significant and undisputed presence.[11] *Flores-Galarza,* 318 F.3d at 336. Air transportation was not traditionally regulated by states. In contrast, states have historically regulated the ground transport or delivery of dangerous products, especially to minors in order to protect their health, a traditional state concern. For Maine examples, *see* 17-A M.R.S.A. §§ 554-A, 554-B(2) (2003) (unlawful to deliver handgun to a minor); 28-A M.R.S.A. § 2081 (2003) (unlawful to deliver liquor to a minor). *See also* Wis. Stat. § 961.575 (2003) (unlawful to deliver drug paraphernalia to a minor); Mass. Gen. Laws Ann. ch. 94, § 307C (2004) (permitting establishment of regulations to prevent the sale or delivery of tobacco to minors); 720 Ill. Comp. Stat. 685/4 (2004) (unlawful to deliver tobacco or smoking herbs to minors). Moreover, Congress has explicitly recognized the states' traditional authority to tax the sale and use of tobacco products, *see* 15 U.S.C. § 375 *et seq.* (1997), and has sought to help states collect cigarette taxes, recognizing that interstate shipments to consumers deprived states of large amounts of revenue. S. Rep. No. 644, *reprinted in* 1949 U.S. Code Cong. Service 2158, 2158-59; S. Rep. No. 1147, *reprinted in* U.S.C.C.A.N. 2423, 2423.

Maine enacted its Tobacco Delivery Law with two primary goals: to limit the consumption of tobacco products

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[11] Under the Puerto Rico statute, no interstate carrier transporting any package subject to an excise tax could deliver the package unless the recipient presented a certificate from the Department of the Treasury evidencing payment of the tax. In the alternative, a carrier could prepay the taxes owed, deliver the packages and seek reimbursement. *Flores-Galarza,* 318 F.3d at 326 (citing 13 P.R. Laws Ann. §§ 9066, 9077). Puerto Rico was trying to find an effective way to collect taxes and in doing so created significant burdens on air transportation, resulting in preemption by the FAAAA.

by minors, and to track delivery sales in order to acquire lost tax revenue.[12] *See* 22 M.R.S.A. §§ 1555-B, 1555-C(3), (4); L.D. 1236, Summary (121st Me. Legis. 2003). The law both protects public health and aids in the state's ability to collect taxes on tobacco. Laws concerning the delivery of hazardous substances and the collection of taxes on the sale of tobacco products are historically within the state's police power. This is not a disguised attempt to impose state regulations on interstate trucking. The challenged provisions are not limited to carriers; they prohibit *any* person from knowingly delivering cigarettes purchased from anyone but a licensed retailer. *See* 22 M.R.S.A. § 1555-D. The Maine Tobacco Delivery Law is like a variety of other statutes regulating the transportation and distribution of potentially harmful items, and requiring carriers to conform to state administrative regulations,

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[12] The growing incidence of internet and telephone delivery sales of tobacco products had two negative effects – increased accessibility of tobacco products to minors, and lost tax revenue for the state. *See* Committee File of the Committee on Health and Human Services and Committee on Taxation on "An Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors" (April 29, 2003). The Maine law requires retailers selling tobacco products in Maine to be licensed. 22 M.R.S.A § 1551-A. Licensed retailers must file reports so that they will be properly taxed, and must use a delivery service that confirms the purchaser/addressee is of legal age to buy tobacco products. *See* 22 M.R.S.A. §§ 1555-C(3), (4). The deliverers are the enforcement mechanism – they can only deliver tobacco products purchased from a licensed retailer (*i.e.*, those retailers who won't sell to minors and who pay taxes). I do recognize that the First Circuit in *Flores-Galarza* found that United Parcel Service, forced to collect excise taxes under the Puerto Rico statute which forbade delivery unless and until a recipient produced a treasury certificate, faced significant delay and additional costs. 318 F.3d at 336. But such significant forbidden effects are not apparent on the face of this Maine statute.

receive state authorization, or limit transport to certain parties.[13]

The truckers argue that the FAAAA's goal to eliminate state regulation included state restrictions on "types of commodities carried," citing a statement in the conference committee report that led to the FAAAA's enactment. Pl.'s Mot. at 8 (*citing* H.R. Conf. Rep. No. 103-677, at 86,

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[13] For Maine examples, *see, e.g.*, 12 M.R.S.A. § 8306 (2003) ("may . . . prohibit the transportation . . . of any forest or shade tree or part of any forest or shade tree . . . capable of supporting a disease or insect infestation. . . ."); 8 M.R.S.A. § 225 (2003) ("No person may transport fireworks in any motor vehicle or in any conveyance except as may be permitted by the rules promulgated by the Commissioner of Public Safety."); 17-A M.R.S.A. § 1118 (2003) ("A person is guilty of illegal importation of scheduled drugs if the person intentionally or knowingly brings, carries or transports a scheduled drug other than marijuana into the State from another state or country. . . ."); 28-A M.R.S.A. § 2073 (2003) ("No person may knowingly transport within the State any liquor: A. With intent to sell the liquor in the State in violation of law; B. With intent that the liquor be illegally sold by any person; or C. With intent to aid any person in illegal sale of liquor."); 28-A M.R.S.A. § 2077 (2003) ("No person other than a wholesale licensee, small brewery licensee or farm winery licensee may transport or cause to be transported malt liquor or wine into the State in a quantity greater than 3 gallons for malt liquor and 4 quarts for wine, unless it was legally purchased in the State."); 7 M.R.S.A. § 3981(2002) (regulating periods of confinement and conditions for transportation of animals); 12 M.R.S.A. §§ 7534, 12354 (2003) ("Common carrier accepting any wild animal or wild bird for transportation shall: 1. CHECK LICENSE. Be satisfied that the person presenting that animal or bird for shipment is the person to whom the hunter's license offered for inspection was issued; 2. AFFIX TAGS. Securely affix any tags and identification required by this chapter; and 3. MAKE RETURNS. Make such returns to the commissioner as he may require."); 17-A M.R.S.A. § 554-B(2) ("A person is guilty of unlawfully transferring a handgun to a minor if that person knowingly transfers a handgun to a person who the transferor knows or has reasonable cause to believe is a minor.").

reprinted in 1994 U.S.C.C.A.N. at 1758).[14] But the same report stated that as of August 1994, Maine was not a jurisdiction that impermissibly regulated prices, routes, and services. H.R. Conf. Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1758. (Nor were Alaska, Arizona, Delaware, District of Columbia, Florida, Maryland, New Jersey, Vermont, and Wisconsin.) Many of the Maine statutory provisions regulating the transportation of potentially harmful products were already in affect when Congress passed the FAAAA in 1994. *See, e.g.*, 28-A M.R.S.A. §§ 2073, 2077 (liquor transportation provisions; originally enacted in 1987); 12 M.R.S.A. § 7534 (2003) (requirements for carriers transporting wild animals; originally enacted in 1979). *See also* Wis. Stat. § 29.357 (2003) (provision requiring labeling wild game shipments; originally enacted in 1985); N.J. Stat. § 23:3-33 (2003) (labeling requirements for killed game; enacted pre-1994). Thus, the legislative history does not persuade me that Congress intended to preempt outright that traditional area of state concern. To adopt the truckers' argument would mean that states are foreclosed from regulating or prohibiting the transport of drugs, poached game, or other contraband, an unlikely result.[15] *See Robertson v. State of*

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[14] Although the legislative history indicates that state regulation of the "types of commodities carried" is typical, there is no further discussion of such regulation, and thus I can make no inferences from the legislative history as to what types of restrictions on commodities, if any, Congress meant to preempt. *See* H.R. Conf. Rep. No. 103-677, at 86-87, *reprinted in* 1994 U.S.C.C.A.N. at 1758-59.

[15] The truckers also argue that if Maine prevails, then states can varyingly prohibit or regulate the delivery of junk foods, diet aids, herbal remedies, and the like. Perhaps so; perhaps not. Each such law will have to be evaluated separately.

Washington Liquor Control Bd., 102 Wn. App. 848, 10 P.3d 1079, 1084 (Wash. Ct. App. 2000).

III. CONCLUSION

I conclude that 22 M.R.S.A. § 1555-C(3)(A), 22 M.R.S.A. § 1555-C(3)(C), and 22 M.R.S.A. § 1555-D are not facially preempted by the FAAAA. I therefore DENY the truckers' motion for summary judgment.

The parties shall confer and by March 26, 2004, provide a stipulation of facts for the Court's ruling or, if they are unable to reach a stipulation, request an early conference with the Court to determine how the motion will proceed on the "as applied" challenge.

SO ORDERED.

DATED THIS 6TH DAY OF FEBRUARY, 2004

/s/ D. BROCK HORNBY

UNITED STATES DISTRICT JUDGE

MAINE STATUTES INVOLVED

22 Me. Rev. Stat. § 1555-A

§ 1555-A. Identification cards

A licensee may refuse to sell tobacco to any person who fails to display upon request an identification card issued under Title 29-A, section 1410 or a motor vehicle operator's license bearing the photograph of the operator and issued under Title 29-A.

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22 Me. Rev. Stat. § 1555-B

§ 1555-B. Sales of tobacco products

1. Retail sales. Tobacco products may be sold at retail only in a direct, face-to-face exchange in which the purchaser may be clearly identified and through the mail under procedures approved by the department to provide reliable verification that the purchaser is not a minor. For direct, face-to-face sales, employees who sell tobacco products must be at least 17 years of age. An employee who is at least 17 years of age but less than 21 years of age may sell tobacco products only in the presence of an employee who is at least 21 years of age and is in a supervisory capacity.

2. Sales to minors prohibited. A person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age. Tobacco products may not be sold at retail to any person under 27 years of age unless the seller first verifies that person's age by means of reliable photographic identification containing the person's date of birth.

3. Sales through vending machines. Tobacco products may be sold through vending machines according to section 1553-A.

4. Wholesale sales. Tobacco products may be distributed at wholesale without a face-to-face exchange only in the normal course of trade and under procedures approved by the Bureau of Revenue Services to ensure that tobacco products are not provided to any person under 18 years of age.

5. REPEALED. Laws 2003, c. 452, § K-7, eff. July 1, 2004.

5-A. Possession and use of cigarettes, cigarette papers or tobacco products by minors prohibited. Except as provided in subsection 5-B, a person under 18 years of age may not:

A. Purchase, possess or use cigarettes, cigarette papers or any tobacco product;

B. Violate paragraph A after having previously violated this subsection; or

C. Violate paragraph A after having previously violated this subsection 2 or more times.

5-B. Exception to possession by minor. A person under 18 years of age may transport or permit to be transported in a motor vehicle cigarettes, cigarette papers or tobacco products in the original sealed package in which they were placed by the manufacturer if the transportation is in the scope of that person's employment.

5-C. Use of false identification by minors prohibited. A person under 18 years of age may not:

A. Offer false identification in an attempt to purchase a tobacco product or to purchase, possess or use cigarettes, cigarette papers or any other tobacco product;

B. Violate paragraph A after having previously violated this subsection; or

C. Violate paragraph A after having previously violated this subsection 2 or more times.

6. Display of prohibition of sales to juveniles. A dealer or distributor of tobacco products shall post notice of this section prohibiting tobacco and cigarette paper sales to persons under 18 years of age. Notices must be publicly and conspicuously displayed in the dealer's or distributor's place of business in letters at least 3/8 inches in height. Signs required by this section may be provided at cost by the department.

7. Enforcement. Law enforcement officers shall enforce this section. A citizen may register a complaint under this section with the law enforcement agency having jurisdiction. The law enforcement agency may notify any establishment or individual subject to this section of a citizen complaint regarding that establishment's or individual's alleged violation of this section and shall keep a record of that notification.

8. Fines. Violations of this section are subject to fines according to this subsection.

A. A person who violates subsection 1, 2, 3 or 4 commits a civil violation for which a fine of not less than $50 and not more than $1,500, plus court costs, must be adjudged for any one offense. Except pursuant to Title 15, section 3314, the fine may not be suspended.

A-1. An employer of a person who violates subsection 1, 2, 3 or 4 commits a civil violation for which a fine of not less than $50 and not more than $1,500, plus court costs, must be adjudged. The fine may not be suspended.

B. A person who violates subsection 5-A or 5-C commits a civil violation for which the following fines may be adjudged.

1) For a first offense, a fine of not less than $100 and not more than $300 may be imposed. The judge, as an alternative to or in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

2) For a 2nd offense, a fine of not less than $200 and not more than $500 may be imposed. The judge, as an alternative to or in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

3) For all subsequent offenses, a fine of $500 must be imposed and that fine may not be suspended. The judge, in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

C. A person who violates subsection 6 commits a civil violation for which a fine of not less than

$50 and not more than $200 may be adjudged for any one offense.

9. Distribution of fines. Fines and forfeitures collected pursuant to subchapter 1 and this subchapter must be credited as follows: one half to the General Fund and ½ to be deposited in a nonlapsing account of the Maine Criminal Justice Academy for the purpose of providing funds for training and recertification of part-time and full-time law enforcement officers.

10. Affirmative defense. It is an affirmative defense to prosecution for a violation of subsection 1, 2 or 4 that the defendant sold, furnished, gave away or offered to sell, furnish or give away a tobacco product to a person under 18 years of age in reasonable reliance upon a fraudulent proof of age presented by the purchaser.

11. Manner of displaying and offering for sale. Tobacco products may be displayed or offered for sale only in a manner that does not allow the purchaser direct access to the tobacco products. The requirements of this subsection do not apply to the display or offering for sale of tobacco products in multi-unit packages of 10 or more units, in tobacco specialty stores or in locations in which the presence of minors is generally prohibited. This requirement does not preempt a municipal ordinance that provides for more restrictive regulation of the sale of tobacco products.

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22 Me. Rev. Stat. § 1555-C

§1555-C. Delivery sales of tobacco products

The following requirements apply to delivery sales of tobacco products within the State.

1. License required. It is unlawful for any person to accept an order for a delivery sale of tobacco products to a consumer in the State unless that person is licensed under this chapter as a tobacco retailer. The following penalties apply to violations of this subsection.

A. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

B. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 2, 3 or 4 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

2. Requirements for accepting order for delivery sale. The following provisions apply to acceptance of an order for a delivery sale of tobacco products.

A. When accepting the first order for a delivery sale from a consumer, the tobacco retailer shall obtain the following information from the person placing the order:

(1) A copy of a valid government-issued document that provides the person's name, current address, photograph and date of birth; and

(2) An original written statement signed by the person documenting that the person:

(a) Is of legal age to purchase tobacco products in the State;

(b) Has made a choice whether to receive mailings from a tobacco retailer;

(c) Understands that providing false information may constitute a violation of law; and

(d) Understands that it is a violation of law to purchase tobacco products for subsequent resale or for delivery to persons who are under the legal age to purchase tobacco products.

B. If an order is made as a result of advertisement over the Internet, the tobacco retailer shall request the e-mail address of the purchaser and shall receive payment by credit card or check prior to shipping.

C. Prior to shipping the tobacco products, the tobacco retailer shall verify the information provided under paragraph A against a commercially available database derived solely from government records consisting of age and identity information, including date of birth.

D. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

E. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 3 or 4 commits a civil violation for which a fine of not less than

$1,000 and not more than $5,000 may be adjudged.

3. Requirements for shipping a delivery sale. The following provisions apply to a tobacco retailer shipping tobacco products pursuant to a delivery sale.

A. Prior to shipping, the tobacco retailer shall provide to the delivery service the age of the purchaser as provided under subsection 2, paragraph A and verified under subsection 2, paragraph C.

B. The tobacco retailer shall clearly mark the outside of the package of tobacco products to be shipped to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the tobacco retailer.

C. The tobacco retailer shall utilize a delivery service that imposes the following requirements:

(1) The purchaser must be the addressee;

(2) The addressee must be of legal age to purchase tobacco products and must sign for the package; and

(3) If the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

D. The delivery instructions must clearly indicate the requirements of this subsection and must declare that state law requires compliance with the requirements.

E. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

F. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 2 or 4 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

4. Reporting requirements. No later than the 10th day of each calendar month, a tobacco retailer that has made a delivery sale of tobacco products or shipped or delivered tobacco products into the State in a delivery sale in the previous calendar month shall file with the Department of Administrative and Financial Services, Bureau of Revenue Services a memorandum or a copy of each invoice that provides for each delivery sale the name and address of the purchaser and the brand or brands and quantity of tobacco products sold. A tobacco retailer that meets the requirements of 15 United States Code, Section 375 et seq. (1955) satisfies the requirements of this subsection. The following penalties apply to violations of this subsection.

A. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

B. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 2 or 3 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

5. Unlawful ordering. It is unlawful to submit ordering information for tobacco products by delivery sale under subsection 2, paragraph A in the name of another person. A person who violates this subsection commits a civil violation for which a fine of not more than $10,000 may be adjudged.

6. Rulemaking. The department and the Department of Administrative and Financial Services shall adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

7. Forfeiture. Any tobacco product sold or attempted to be sold in a delivery sale that does not meet the requirements of this section is deemed to be contraband and is subject to forfeiture in the same manner as and in accordance with the provisions of Title 36, section 4372-A.

8. Enforcement. The Attorney General may bring an action to enforce this section in District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction, and fines, penalties and equitable relief and may seek to prevent or restrain actions in violation of this section by any person or any person controlling such person. In addition, a violation of this section is a violation of the Maine Unfair Trade Practices Act.

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22 Me. Rev. Stat. § 1555-D

§1555-D. Illegal delivery of tobacco products

A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer. A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of section 1555-C, subsection 3, paragraph B or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section.

1. Lists. The Attorney General shall maintain lists of licensed tobacco retailers and known unlicensed tobacco retailers. The Attorney General shall provide to a delivery service lists of licensed tobacco retailers and known unlicensed tobacco retailers. The list of known unlicensed tobacco retailers is confidential. A delivery service that receives a list of known unlicensed tobacco retailers shall maintain the confidentiality of the list.

2. Penalty. The following penalties apply for violation of this section.

A. A person who violates this section commits a civil violation for which a fine of not less than $50 nor more than $1500 may be adjudged for each violation. A fine imposed under this paragraph may not be suspended.

B. An employer of a person who, while working and within the scope of that person's employment, violates this section commits a civil violation for

which a fine of not less than $50 nor more than $1,500 may be adjudged for each violation. A fine imposed under this paragraph may not be suspended.

3. Enforcement. The Attorney General may bring an action to enforce this section in District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction, and fines, penalties and equitable relief and may seek to prevent or restrain actions in violation of this section by any person or any person controlling such person. In addition, a violation of this section is a violation of the Maine Unfair Trade Practices Act.

4. Affirmative defense. It is an affirmative defense to a prosecution under this section that a person who transported tobacco products or caused tobacco products to be delivered reasonably relied on licensing information provided by the Attorney General under this section.

5. Rulemaking. The department shall adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

6. Forfeiture. Any tobacco product sold or attempted to be sold in a delivery sale that does not meet the requirements of this section is deemed to be contraband and is subject to forfeiture in the same manner as and in accordance with the provisions of Title 36, section 4372-A.